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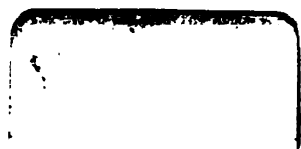
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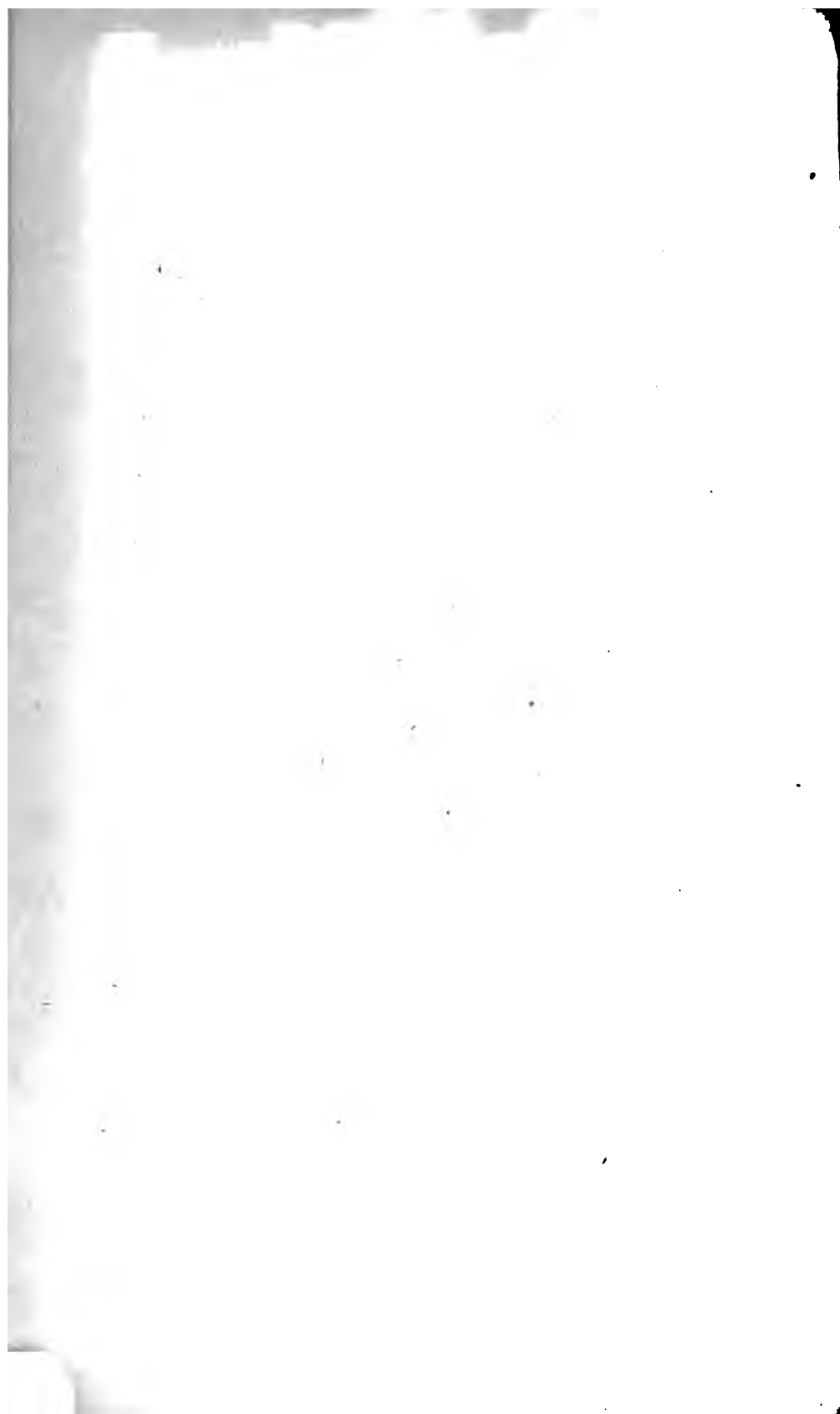
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KANSAS
CRIMINAL LAW
AND PRACTICE.

BY IRWIN TAYLOR,
OF THE TOPEKA BAR.

VOL. I.

PART I. CRIMINAL DECISIONS.

PART II. CRIMINAL PRACTICE.

TOPEKA, KANSAS:
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PART I.—CRIMINAL DECISIONS.

ABORTION.

1. The offense prescribed by § 15 of the act regulating crimes and punishments, of administering medicines, drugs and substances to a woman pregnant with a quick child, with the intent to destroy such child, includes the offense prescribed by § 44 of such act, of administering medicines, drugs and substances to a pregnant woman, with the intent to procure abortion or miscarriage; and hence, where the defendant is prosecuted upon a charge of committing the first of the above mentioned offenses, he may be found guilty of committing the second of the aforesaid offenses. (Crim. Code, §§ 121, 122; *State v. Watson*, 30 K. 281.)

2. District courts have concurrent original jurisdiction with justices of the peace in all cases of misdemeanor in which the fine cannot exceed \$500, and the imprisonment cannot exceed one year. (Comp. Laws of 1879, ch. 28, § 1; Laws of 1869, ch. 61, §§ 1 and 2; *State v. Granville*, 26 K. 158.) And like justices of the peace, they have jurisdiction of such cases whether a preliminary examination has first been had, or not; and hence, where a defendant is prosecuted for a felony which includes a misdemeanor of the kind above mentioned, and no proper preliminary examination has been had for either the felony or the misdemeanor, and the defendant files a plea in abatement, because of such want of preliminary examination, and the court overrules the same, and the defendant is afterward tried and found guilty of the misdemeanor only, and is sentenced therefor, *held*, that no material error was committed. (*State v. Watson*, 30 K. 281.)

3. The introduction of evidence tending to show that the

prosecuting witness, under the direction of the defendant, took medicine in other places than the county in which the offense is charged to have been committed, was not material error under the facts and circumstances of this case. (*State v. Watson*, 30 K. 281.)

4. The sufficiency of the evidence with reference to intent commented upon. (*State v. Watson*, 30 K. 282.)

5. The court in its instruction to the jury used the language of the statute, "any medicine, drugs or substances." *Held*, Not error, under the facts of this case. (*State v. Watson*, 30 K. 281.)

6. *Held*, Under the facts of this case, that "Mollie" Brown was "Mary" Brown; that the two names represented the same person; and that the administering of medicines, drugs and substances to "Mollie" Brown was the administering of such medicines, drugs and substances to "Mary" Brown. (*State v. Watson*, 30 K. 282.)

ALIBI.

7. In a criminal action, where the defense of an *alibi* is set up, it does not devolve upon the defendant to prove the defense by a preponderance of the evidence. If the state alleges that the accused was personally present at the commission of the crime, and such personal presence is necessary to a conviction, that fact must be established by the state, by evidence that will convince the jury beyond a reasonable doubt. (*State v. Child*, 40 K. 482.)

APPEAL.

8. The law allows no appeal in a criminal case, until its final determination; so *held*, when defendant, in a joint indictment, had been used by the state as a witness against his co-

defendant, had testified fully, and where defendant was convicted, and a motion made for the discharge of the defendant testifying, which was overruled by the court below. (*Cummings v. State*, 4 K. 225.)

9. An accomplice so used by the state, as witness, is not entitled to his discharge as a matter of right; he must abide by the discretion of the court and prosecuting attorney. (*Cummings v. State*, 4 K. 225.)

10. Attorneys of record of defendants, in a criminal case in the district court, have no power to accept service of notice of appeal by the state. The service must be personal, or, in case the defendants cannot be found, by posting in the office of the clerk of the district court. (*State v. Baird*, 9 K. 60.)

11. Where a prosecution is had in the name of a city of the first class as plaintiff, before the police judge of such city, for an alleged violation of a city ordinance, and a motion is made by the defendant to quash the complaint, and the decision of the police judge on such motion is against the city, the city cannot take an appeal directly from the decision of the police judge to the supreme court. (*City of Leavenworth v. Weaver*, 26 K. 392.)

12. In a criminal case, where the state attempts to take an appeal from the district court to the supreme court, it is not sufficient to serve the notice of appeal on the counsel of record for the defendant in the court below. (*State v. Brandon*, 6 K. 243.)

13. Pending an appeal to the supreme court, in a case for fine and costs, and imprisonment therefor until paid, the entire judgment is suspended. (*City of Miltonvale v. Lanoue*, 35 K. 603; *In re Simmons*, 39 K. 125.)

14. The defendant in a criminal cause cannot have the judgment rendered against him reviewed in the supreme court upon anything short of a full and true transcript of all the pleadings, papers and proceedings which make up the record of the cause. (*State v. Ricker*, 40 K. 14.)

15. Where an appeal is taken in a criminal cause to the su-

preme court from a judgment rendered against a defendant in a district court, the certificate of the transcript filed must show that the record is a true transcript of all the proceedings had in the cause; otherwise, the decision of that court cannot be reviewed by the supreme court. (*State v. Prater*, 40 K. 15.)

ARSON.

16. On the trial of the appellant (defendant below) for arson, where the court erred in overruling a challenge by him, to persons sworn on their *voir dire* as jurors, and where the same persons are afterwards challenged peremptorily and rejected from the jury, on appeal brought by the defendant below, from a judgment against him, *held*, (Crim Code, § 276,) that the judgment of the court below will not be reversed, unless the record shows that the defendant had exhausted his peremptory challenges. (*Morton v. State*, 1 K. 468.)

17. Where a grist mill and all its contents, including the books of account of the owners of the mill, are destroyed by one single fire, and the defendant is prosecuted criminally for setting fire to and burning the mill, and on such charge is acquitted, *held*, that such acquittal is a good defense to a subsequent prosecution for setting fire to and burning the books of account. (*State v. Colgate*, 31 K. 511.)

ASSAULTS.

(See ASSAULT TO KILL; SHOOTING TO KILL.)

18. An information in a criminal action, charging an assault, is sufficient if it states the facts constituting the offense in general terms, and not in minute detail. (*State v. Finley*, 6 K. 366.)

19. It is not necessary that the information itself should show that a preliminary examination had been first had before the filing of the information, nor that the information itself should

show a legal cause for filing the same without such preliminary examination; and an information otherwise good, filed without such showing, will be held good on motion to quash, or on a motion in arrest of judgment. (*State v. Finley*, 6 K. 366.)

20. On an appeal in a criminal case from a judgment of a justice of the peace to the district court, it is the duty of the justice to certify up the original complaint, and it is not sufficient for him to send a certified copy, and it is error for the district court to proceed to trial over the objection of the defendant upon such certified copy. (*State v. Anderson*, 17 K. 89.)

21. In such case, the defendant had not waived his right to object to trial upon a certified copy of a complaint, from the fact that at a prior term he had gone to trial thereon without objection. (*State v. Anderson*, 17 K. 89.)

22. The judgment of a justice of the peace in a criminal case cannot be reviewed on petition in error in the district court. (*State v. Lofland*, 17 K. 390.)

23. The district court has no jurisdiction of a criminal case removed on petition in error to it from the judgment of a justice of the peace. (*State v. Lofland*, 17 K. 390.)

24. In a criminal action for assault and battery, appealed from a justice's court to the district court, the district court adjudged, upon an acquittal of the defendant, that the prosecuting witness should pay the costs. No appeal was ever taken from the district court to the supreme court. But the prosecuting witness made a case for the supreme court under the provisions of the code of civil procedure, and brought the case to the supreme court on such case-made and on petition in error. No appearance was made in the supreme court by either the county attorney or the attorney general. Held, That the case was not rightfully brought to the supreme court, and that the petition in error must therefore be dismissed. (*Reisner v. State*, 19 K. 479; *McGilvray v. State*, 19 K. 479.)

25. An appearance in the supreme court for the state, by any person not authorized by law to appear for the state, would not cure the error (not bringing the case properly to the su-

preme court), and confer jurisdiction. (And *quære*: Would an appearance by even the county attorney, or attorney general, make any difference?) (*Reisner v. State*, 19 K. 479; *McGilvray v. State*, 19 K. 479.)

26. If one deliberately points and cocks a loaded pistol at another, who is a mere trespasser upon his lands, within a distance which the pistol will carry, and compels such trespasser, through fear of personal violence from the deadly weapon aimed at him, to leave the premises, he is guilty of an assault. (*State v. Taylor*, 20 K. 643.)

27. If the jury in a prosecution for an assault carry with them on retiring to consider of their verdict a paper having writing thereon, which is folded accidentally with the instructions in the case, and it was not shown that such unauthorized and detached paper has produced any improper influence on the jury, nor is it apparent from its contents that it could have influenced the finding of the jury, nor prejudiced the rights of the defendant: *Held*, Not error for the district court to overrule a motion for a new trial based upon the reception and perusal of the paper by the jury. (*State v. Taylor*, 20 K. 643.)

28. Evidence showing that the prosecuting witness in a criminal case resided in Phillips county, Kansas, and that the offense charged was committed on his premises and near his residence, is sufficient evidence to show that the offense was committed in Phillips county, Kansas. (*State v. Benson*, 22 K. 471.)

29. The defendant was charged with committing an assault on the prosecuting witness, with the intent to kill him. The evidence showed that both occupied a certain piece of land; that both claimed to have the better right thereto; that they had a contest in the United States land office for the title thereto, and that out of these adverse claims the final difficulty arose, in which said alleged assault with intent to kill was committed. *Held*, That it was immaterial, on the trial, as to which had the better right to the land. (*State v. Benson*, 22 K. 471.)

30. A judgment of conviction in a criminal case in the dis-

strict court carries costs against the defendant. (*Commissioners v. Whiting*, 4 K. 273; *State v. Granville*, 26 K. 158.)

31. When the prosecution is for a felony, and the conviction only of a misdemeanor included therein, only such costs are taxable as would have been taxable had the prosecution been for the misdemeanor. (*State v. O'Kane*, 23 K. 244; *State v. Granville*, 26 K. 158.)

32. As the district court has jurisdiction concurrently with justices of the peace of misdemeanors, if the defendant be bound over on a preliminary examination before a justice of the peace in answer to a charge of felony, and thereafter on trial in the district court is found guilty of only a misdemeanor, which might have been tried before a justice, the costs of the preliminary examination are properly taxable against the defendant, and this notwithstanding that on such preliminary examination he demanded that the charge of felony be abandoned and he be put upon trial simply for the misdemeanor. (*State v. Granville*, 26 K. 158.)

33. A joint prosecution against four defendants was commenced, and witnesses subpoenaed by the state for the trial; a separate trial was demanded and one of the defendants tried before a jury. After a verdict of guilty was returned the other defendants pleaded guilty; some of the witnesses subpoenaed and attending were not sworn. There being nothing in the record to show for what purpose they were subpoenaed, or that their testimony would not have been necessary on the trial of the others who pleaded guilty, *held*, that such witness fees were properly taxable against the defendants. (*State v. Granville*, 26 K. 158.)

34. A single information having been filed against four defendants, they demanded separate trials. After a jury had returned a verdict of guilty against one, the others entered a plea of guilty; thereupon a single journal entry of judgment was made, in which a separate punishment was imposed upon each of the four defendants, but a joint judgment against all for the entire costs. *Held*, That whether, upon a plea of guilty in an

ordinary case, the county attorney is entitled to a trial fee or not, the pleas of guilty entered in this case were in effect a waiver of the demand for separate trials, and a consent that the single verdict should stand as a verdict against all, and that a single trial fee was all that was taxable to the county attorney. (*State v. Granville*, 26 K. 158.)

35. Two complaints were filed with the police judge of the city of Olathe, for alleged violations of the ordinances of said city. The first charged the defendant with disturbing the peace of J. and others, and the city, by drawing a revolver and pointing the same at J., and threatening to blow his brains out, and by being guilty of other violent conduct and language; but did not charge any battery upon any person, and did not charge an assault upon any person, except upon J. The second charged the defendant with committing an assault and battery upon F., and did not charge any other breach of the peace. The defendant pleaded guilty to both charges, and was sentenced to pay a fine in each case. Afterward he took an appeal in the first case to the district court, and there pleaded a former conviction, claiming that the two prosecutions were for the same offense, and that the prosecution and sentence in the second case were a bar to any further prosecution in the first case. The evidence upon this special plea showed that all the matters charged in the two complaints grew out of the same difficulty, and occurred at the same time; but *held*, nevertheless, that the matters charged did not constitute one and the same offense, but that two offenses were charged. (*City of Olathe v. Thomas*, 26 K. 233.)

36. On a trial of a criminal prosecution for assault and battery, the defendant has not a right to offer in evidence the declarations of the party assaulted, who is also the prosecuting witness, made before or after the affray, in reference to it. (*State v. Newland*, 27 K. 764.)

37. Where a party is charged with an assault with intent to kill, and upon the trial is found guilty simply of assault and battery, it is unnecessary in this court, upon appeal, to consider

whether there was any error in so much of the proceedings and case as refers alone and exclusively to the matter of an intent to kill. (*State v. Newland*, 27 K. 764.)

38. Where two parties meet and have a fight, the party who unlawfully makes the assault may properly be convicted of an assault, and this *notwithstanding* it appears that the party assaulted thereafter becomes an aggressor, uses unnecessary violence, and is therefore himself guilty of an assault and battery. (*State v. Newland*, 27 K. 764.)

39. Where two parties on horseback meet and have an encounter, and thereafter each party dismounts, lets his horse go, and both willingly engage in a fist fight, and no question of self-defense arises, then each party is guilty of an assault and battery, and this irrespective of the question as to who in the first instance, and while on horseback, was the aggressor. (*State v. Newland*, 27 K. 764.)

40. An information that charges "that on the 29th day of May, A. D. 1882, one B., in the county of Chase and state of Kansas, then and there being, then and there with a deadly weapon, to wit, a pitchfork, did, with said deadly weapon, commit an assault and battery upon the person of M., with the unlawful and felonious intent then and there to kill, maim and wound the said M.," contains a sufficient statement of facts to sustain a conviction for assault and battery. (*State v. Beverlin*, 30 K. 611.)

41. Where an information, filed February, 1883, charged in the *past tense* that the defendant *did*, in December, 1883, commit an assault with intent to kill, to which information the defendant pleaded not guilty, and after a jury had been impaneled and sworn, he objected to the introduction of any testimony, on the ground that the time charged was subsequent to that of the filing of the information, *held*, that the court did not err in permitting the county attorney to amend the information by changing the figure 3 to 2, so as to show a date anterior to that of the filing of the information. Such a change is not one

working prejudice to the substantial rights of the defendant. (*State v. Cooper*, 31 K. 505.)

42. Under a charge of assault and battery with intent to kill, a defendant may be convicted of a simple assault and battery; and where the information charges such assault and battery with a revolver, and the verdict finds the defendant guilty of assault and battery as charged in the information, and the evidence is not preserved in the record, *held*, that no special instructions having been asked by the defendant, it cannot be adjudged that there was such error in the proceedings as to compel a reversal, because the court did not specifically instruct that, under the information charging an assault and battery with a revolver, the defendant could not be convicted of an assault and battery in any other manner. (*State v. Cooper*, 31 K. 505.)

43. Great latitude should be allowed on the cross-examination of a witness, where it is claimed that his testimony is affected by the friendship or enmity he has towards either party in the action; and as a general rule the party against whom a witness is produced has a right to show everything which may in the slightest degree affect his credibility. (*State v. Collins*, 33 K. 77.)

44. The admission of a witness of ill feeling or prejudice against one of the parties to an action does not preclude such party from inquiring into the degree or intensity of the hostile feeling, nor from cross examining the witness as to the character and extent of the prejudice he may have against such party. (*State v. Collins*, 33 K. 77.)

45. Instructions given by the district court which were not excepted to will not be reviewed in the supreme court. (*State v. English*, 34 K. 629.)

46. Where the record contains none of the evidence, nor any statement of facts in the case upon which special instructions are predicated, we cannot determine their applicability, nor that they were erroneously refused. (*State v. English*, 34 K. 629.)

47. Unless the contrary affirmatively appears, it will be presumed that the proceedings of the trial court submitted for review were regular. (*State v. English*, 34 K. 629.)

48. When a defendant appeals to the district court from a judgment of a justice of the peace in a criminal action, and there submits to trial without objection, upon a complaint which was not certified to by the justice of the peace, but which was sufficient in other respects, and stated precisely the same offense for which he had been tried before the justice of the peace, he will be held to have waived the want of certification. (*State v. English*, 34 K. 629.)

49. Where a defendant is charged with an offense which includes others of an inferior degree, the law of each degree which the evidence tends to prove should be given to the jury; but where the defendant was charged with assault and battery and convicted of assault, and it appears from the evidence that if he was not guilty of assault and battery he was not guilty of any offense, and instruction by the court upon the lower degree of the offense, is inapplicable, and may have misled the jury, and as the testimony is such as to leave the question of the defendant's guilt in doubt, and we are unable to say that the erroneous instruction was not prejudicial to the defendant, the judgment of the conviction must be reversed. (*State v. Mize*, 36 K. 187.)

50. In a criminal prosecution for assault and battery, the defendant therein was, in a justice's court, convicted and sentenced to pay a fine and the costs, but on appeal, and in the district court, said defendant was acquitted and discharged. The court then assessed the costs of the case against the prosecuting witness, on the ground "that the defendant had been tried, acquitted and discharged." *Held*, That this was error. (*State v. Reisner*, 20 K. 548.)

51. The following sections of the statutes examined, and held not to authorize the said ruling of the district court, to wit: Sec. 326 of the code of criminal procedure; § 18 of the act relating to jurisdiction and procedure before justices of the

peace in cases of misdemeanor, and § 13 of the act fixing the fees of certain officers and persons. (*State v. Reiser*, 20 K. 548.)

52. Upon the evidence of the plaintiff, the trial court would have been justified in withdrawing the case from the consideration of the jury, and deciding it in favor of the defendant. After all the evidence had been presented on both sides, the court would have been justified in instructing the jury to render a verdict for the defendant. As there is no evidence in the record tending to show that the assault and robbery grew out of any service in which any employe of the defendant was engaged, or that was in the line of duty of any employe of the defendant, but appears to have been clearly disconnected therefrom, the judgment rendered is the only one that the evidence will support. (*Sachrowitz v. A. T. & S. F. Rld. Co.*, 37 K. 212.)

ASSAULT TO KILL.

53. *Semble*, That an objection to an indictment commencing as follows: "In the second judicial district, sitting in and for the county of Doniphan, March term, 1862, *The State of Kansas v. Alfred Guy*: Indictment. The jurors of the grand jury, selected, impaneled and sworn in and for the body of said county, charged to inquire of offenses committed within the said county, in the name and by the authority of the state of Kansas, upon their oaths do present and find, that Alfred Guy," etc., on the ground of its omitting to set forth that the grand jury were of the county of Doniphan, is not well taken. *Held*, That such an omission is not one of the causes specified in § 260, criminal code (1859), for the arrest of judgment, and not available in a motion under that section. (*Guy v. State*, 1 K. 448.)

54. *Held*, That an assault and battery is not indictable. (*Guy v. State*, 1 K. 448.)

55. Where the appellant was indicted for an assault with intent to kill, and convicted of an assault, the finding was in con-

formity with § 107 of the criminal code, (1859) and not in conflict with § 298 of the act for the punishment of crimes. (*Guy v. State*, 1 K. 448.)

56. *Held*, That an assault is an offense of an inferior degree to an assault with intent to kill. (*Guy v. State*, 1 K. 448.)

57. COBB, C. J., dissenting, *contended* that the district court has no jurisdiction to try criminal cases for assault. (*Guy v. State*, 1 K. 448.)

58. In a criminal prosecution for an alleged assault with intent to kill, where the defendant claims that he acted solely in self defense and to prevent a felony from being committed upon him, and evidence is introduced tending to show that such were the nature and character of his acts, it is then competent for the defendant, in corroboration of such evidence, to introduce other evidence, tending to show that the person on whom the alleged assault is alleged to have been committed had, some time previously to such alleged assault, assaulted the defendant with a deadly weapon, and had also threatened to kill him, which threats had been communicated to the defendant previously to such alleged assault. (*State v. Scott*, 24 K. 68.)

59. W. alleged that P. assaulted him while alone in his own house, with a musket, with intent to kill and rob him. P. was duly informed against, and, on the trial of the criminal action, the court admitted, over the objections of P., the declarations of W., made in the absence of P., three to five minutes after the transaction, to witness, who ran to his assistance on hearing his cries of murder, that P. made an assault with a musket at the window, demanded his money, together with the words and acts of each other. *Held*, That the declarations of W. are merely hearsay, and therefore inadmissible. (*State v. Pomeroy*, 25 K. 349.)

60. The defendant was arrested on July 15, on a charge of shooting with intent to kill, and bound over to await trial. The first regular term of court thereafter in Morris county, the county in which the offense was charged to have been committed, commenced October 25. The information was filed Octo-

ber 22, and the case placed by the clerk on the trial docket for October 25, the first day of the term. On October 20, defendant caused a subpoena to be issued for several witnesses in Leavenworth county, which subpoena was returned by the sheriff of that county, served upon one and only one witness. Want of time prevented service on the others. On October 25, defendant applied for a commission to take testimony in Leavenworth county. No suggestion was made of the inability of the witnesses to attend the trial on account of sickness or otherwise. Their testimony was sought simply to show defendant's character as a quiet and peaceable citizen. The application was overruled. Defendant then filed an application for a continuance, on account of the absence of these witnesses, and also on account of the absence of a witness who he said resided in Morris county, but was temporarily absent, and for whom he had caused a subpoena to be issued on October 25th. The state consenting that the statements in his affidavit should be received as the testimony of these absent witnesses, the application was overruled. *Held*, That the defendant had had ample time to secure his testimony, and that there was no error in overruling these applications for commission and continuance; that a case is triable at the first term of the district court after the arrest; and that both state and defendant are charged with the duty of making preparations for such trial. (*State v. Rhea*, 25 K. 576.)

61. On an application for a change of venue, some six or seven newspaper articles were offered, containing statements of facts similar to those disclosed by the state on the trial, and denouncing in strong and severe language the defendant; also the affidavit of a single witness, that he was one of the party engaged in the search for defendant immediately after the shooting, and that he heard bitter and threatening language in every direction against him. Opposed, were the affidavits of twenty-one citizens from different parts of the county, denying any general prejudice, or any feeling which would prevent a fair trial. It was not shown that there was any difficulty in

obtaining a jury, or any reason to suspect the candor and fairness of the jurors impaneled. *Held*, That the judgment ought not to be set aside because of the refusal to grant a change of venue. (*State v. Rhea*, 25 K. 576.)

62. The information charged an offense under § 38 of the crimes act. Defendant claimed that included therein were the offenses described in §§ 41, 42, 43, and that the court in its instructions should have explained those offenses. The charge to the jury is not challenged so far as it goes. The complaint is that it did not go further. But it does not appear that any instruction asked was refused, nor is it shown that all the instructions given are preserved in the record. Hence, even if defendant's construction of the information and statutes were correct, his claim of error must fail. (*State v. Rhea*, 25 K. 576.)

63. On a motion for a new trial, defendant offered the affidavits of two of the jurors, showing that upon consultation in the jury room, it appeared that a majority were in favor of returning the verdict finally returned, and a minority opposed thereto — though what verdict such minority was in favor of was not shown; that a compromise was agreed upon, whereby the verdict was agreed to by all, and returned with an unanimous recommendation of the defendant to the mercy of the court. *Held*, No error in overruling the motion for a new trial. (*State v. Rhea*, 25 K. 576.)

64. An information founded on § 38, ch. 31, of the act regulating crimes and punishments (Comp. Laws 1879, p. 331), charging an assault with a deadly weapon, to wit, a revolving pistol, loaded with powder, leaden ball and cap, with the intent to kill, is not fatally defective by an omission to state more fully the manner of the assault, or the mode in which the pistol was used, or attempted to be used. (*State v. Miller*, 25 K. 699.)

65. A judgment cannot be arrested upon the ground that the evidence offered does not support the charge made against the defendant. (*State v. McCool*, 34 K. 617.)

66. A statement by the county attorney that he would show

to the jury that the defendant had committed an offense other than the one for which he was being tried, when no such testimony was actually offered or admitted, and when the statement was not objected to, and no prejudice to the defendant appears to have resulted therefrom, is not such misconduct as will overturn the verdict of the jury. (*State v. McCool*, 34 K. 617.)

67. A new trial in a criminal case was asked upon the ground of newly discovered evidence which could not be obtained at the trial; but it appears that the defendant knew of the evidence prior to the trial, and caused a subpoena to be issued and served upon the witness who, it is alleged, will give the new evidence, and who failed to appear at the trial; but no continuance was asked on account of his absence. *Held*, That as the evidence was not discovered since the trial, it cannot be regarded as newly discovered, and that the non-attendance of the witness, who was served with process, is not sufficient ground for a new trial where no continuance was asked on account of his absence. (*State v. McCool*, 34 K. 617.)

68. The county attorney, in connection with an objection to a question asked by defendant's counsel, stated to the court, "that if the court wishes to open the bars and let us go in . . . show all about this case, that the defendant has been found guilty of an attempt at manslaughter." The court promptly advised the jury that the statement was improper, and should be disregarded. *Held*, That the remark is not sufficient cause, under the circumstances of this case, to compel a new trial. (*State v. McCool*, 34 K. 617.)

69. It is not error or impropriety in the court to request ladies in attendance at the trial to withdraw from the court room when counsel for the state are about to comment upon testimony given in a criminal case which was of a vulgar and indecent character. (*State v. McCool*, 34 K. 617.)

70. Where the testimony offered by the state, when taken alone, is competent and sufficient to sustain the prosecution, a verdict which has been approved by the district court will not be

set aside in the supreme court for insufficiency of the evidence. (*State v. Smith*, 35 K. 618.)

71. As a general rule, newly discovered evidence, the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. (*State v. Smith*, 35 K. 618.)

72. The declarations of a party other than the defendant, which formed no part in the *res gestæ*, although they may amount to an admission that he committed the offense charged against the defendant, are not admissible in evidence in behalf of the defendant, and an application for a new trial based on such evidence was properly refused. (*State v. Smith*, 35 K. 618.)

73. Evidence examined, and held to be sufficient to sustain a charge of assault. (*State v. Smith*, 35 K. 618.)

74. Sec. 207 of the criminal code prohibits the trial of any person accused of felony unless he is personally present throughout the trial; and it is therefore error for the court, in a prosecution for felony, to recall the jury and give further instructions while the defendant is absent and under confinement in jail. (*State v. Myrick*, 38 K. 238.)

75. In such case, the presence and consent of defendant's counsel did not waive or cure the illegality; nor will a reviewing court inquire whether the additional instructions given were applicable and correct statements of the law. (*State v. Myrick*, 38 K. 238.)

76. Where an indictment charges that K., the defendant, unlawfully, feloniously, and with malice aforethought, assaulted, with intent to kill F. with a deadly weapon, to wit, a pistol loaded with powder, cap and leaden ball, then and there in the hands of K., and is otherwise sufficient, the indictment is not bad because it does not more definitely charge that F. was the party assaulted. (*State v. Knadler*, 40 K. 359.)

77. Where, in a criminal cause, a petition is presented to the district court for a change of venue, upon the ground that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial

cannot be had therein, the specific facts and circumstances showing such prejudice must be established by affidavits or other evidence; and as the trial court has some discretion in granting or refusing a change of venue, the supreme court will sustain an overruling of such an application, where the affidavits state conclusions of law only, instead of specific facts, and no other evidence is presented to sustain the application. (*State v. Knadler*, 40 K. 359.)

78. On an appeal in a criminal case, where no specific errors are alleged, and the record shows that the defendants had a fair and impartial trial, and the verdict of the jury is clearly sustained by the evidence, such verdict and judgment thereon is conclusive. (*State v. Schreiber*, 41 K. 307.)

79. Where an information charges that the defendants did assault, beat and wound with a deadly weapon, with intent to kill, and the record shows that the defendants did so assault and beat with such deadly weapon, *held*, not error for the court to charge the jury that such information and charge includes the lesser offense of assault and battery. (*State v. Schreiber*, 41 K. 307.)

ATTEMPT TO COMMIT.

80. A defendant is charged in a criminal information with the committing of certain acts which constitute an offense under either of two different sections of the crimes act; the jury find the defendant guilty of committing certain acts, specifying them in their verdict; the acts so specified are all charged in said information, but are not all the acts therein charged; the acts of which the defendant is so found guilty constitute an offense under one of said two sections of said crimes act, but not of the offense prescribed by the other. *Held*, That the court did not err in sentencing the defendant for the offense of which he was so found guilty. (*State v. Fisher*, 8 K. 208.)

ATTORNEY, DISBARRING.(See CONTEMPT.)

81. Where a proceeding is instituted for the purpose of disbarring an attorney at law, on the ground that he fraudulently procured his admission to the bar, the defendant is entitled either to a change of venue or to a trial before a judge *pro tem*, on making the proper application therefor and showing that the regular judge is prejudiced against him. (*Peyton's Appeal*, 12 K. 398.)

82. It is error for a court to render a judgment against an attorney at law, disbarring him, without such attorney first having notice of the nature of the proceeding against him, and having a full opportunity afforded him to defend. (*Peyton's Appeal*, 12 K. 398.)

BASTARDY.

83. While, under § 5 of ch. 104 of the Laws of 1876, a court should require the attendance of a regular panel of at least twelve jurors, yet, if by legitimate and proper excuse that panel be reduced slightly below that number, the court is not compelled to delay the trial of any case until the requisite machinery can be set in motion and made effective for drawing and summoning the deficient number, but may proceed under § 6 of said act to supply the requisite jurors. (*Trembly v. State*, 20 K. 116.)

84. Where under said § 6 the court, at the request of a party, names certain jurors, and such jurors enter the jury box ready for service as jurors, a failure to issue a formal venire to compel their attendance is no substantial error. (*Trembly v. State*, 20 K. 116.)

85. In naming jurors under said section, the court is not bound to send for or examine the assessment roll. (*Trembly v. State*, 20 K. 116.)

86. Where the trial of a civil action was begun in the district court before a jury, with a judge *pro tem.* presiding, during the regular term of the court in that county, and not being finished when the term ended by operation of law, was proceeded with for two days thereafter and while the court was being held in an adjoining county of the same judicial district by the elected judge, in accordance with the legislative command, the entire proceedings of the trial, after the commencement of the court in the adjoining county, are extra judicial and void; and the commencement of the term of court in the adjoining county by the elected judge thereof suspended or closed the term of the first county. (*In re Millington*, 24 K. 214; *Cox v. State*, 30 K. 202.)

87. A recognizance given under § 5 of ch. 47, Comp. Laws 1879 (bastardy act), conditioned that defendant appear at the next term of the district court to answer the complaint, and not depart without leave, and abide the judgment and orders of such court, is not satisfied when the defendant appears at the court and remains in attendance during the trial, but requires that he comply with and perform the judgment that shall be rendered against him. (*Jackson v. State*, 30 K. 88.)

88. A county is not liable for the costs of the sheriff for serving subpoenas and other papers in a bastardy case prosecuted under ch. 47, Comp. Laws of 1879, "providing for the maintenance and support of illegitimate children." (*Gleason v. McPherson Co.*, 30 K. 492.)

89. The relatrix, an unmarried woman, pregnant with a bastard child, commenced a prosecution before a justice of the peace under ch. 47 of Comp. Laws of 1879, against the reputed father, to charge him with the maintenance and education of the child, and while the proceedings were pending, entered on the docket of the justice an admission that provision had been made to her satisfaction for the maintenance of the child, as authorized by the 16th section of said chapter, and dismissed such proceedings. After the birth of the child, she commenced another prosecution for the same cause and purpose, before an-

other justice of the peace, who sustained the charge, and recognized the defendant to appear before the district court, and transmitted a transcript of his proceedings to that court. In the district court, the defendant pleaded the entry of satisfaction on the docket of the justice of the peace in the first prosecution in bar. *Held*, (1) That as the relatrix was induced to make such entry of satisfaction by the false representations, deceit and fraud of the defendant, such satisfaction and entry are void, and not a bar to these proceedings for the same cause and purpose; (2) that such entry of satisfaction may be made before final judgment in any court in which the prosecution is pending. (*State ex rel. v. Young*, 32 K. 292.)

90. The provision of the constitution, declaring that "no person shall be imprisoned for debt except in cases of fraud," applies only to liabilities arising upon contract. (*In re Wheeler*, 34 K. 96.)

91. The purpose of a proceeding in bastardy is to compel the father of an illegitimate child to assist in supporting the fruit of his immoral act, and to indemnify the public against the burden of supporting the child. (*In re Wheeler*, 34 K. 96.)

92. The charge of maintenance and education, which the father of an illegitimate child may be adjudged to pay under the bastardy act, is not a debt in the sense in which that term is used in the provision of the constitution forbidding imprisonment for debt. (*In re Wheeler*, 34 K. 96.)

93. The portion of the act which provides that the defendant, if he be in custody, shall be required to secure the payment of the judgment rendered against him by good and sufficient securities, and in case of default that he shall be committed to jail until the security is given, is not in conflict with § 16 of art. 2 of the constitution. (*In re Wheeler*, 34 K. 96.)

94. Under § 5 of the act relating to illegitimate children, the words in the recognizance requiring the defendant to "abide the judgment and orders" of the court do not mean that the defendant or his sureties shall pay or satisfy the final judgment rendered in the case, but that when such judgment

is rendered he will surrender himself into the custody of the court, ready and willing, as required by § 13 of the act, to secure the payment of such judgment by good and sufficient sureties, or in default thereof to be committed to jail until such security be given. (*McGarry v. State*, 37 K. 9.)

95. The law of this case has been settled by the decision in (*McGarry v. The State*, 37 K. 9.) The record before us sufficiently shows that the defendant below voluntarily appeared and surrendered himself into the custody of the court, as required by § 13 of the act relating to illegitimate children; and therefore 'it fully appears that no breach of the recognizance or bond has taken place. (*McGarry v. The State*, supra.) The judgment of the superior court must be reversed, and the case will be remanded for further proceedings in accordance with the views herein expressed. (*Sowers v. State*, 37 K. 209.)

96. A recognizance given under § 5 of the act relating to illegitimate children, requiring the defendant to remain and abide the judgment and orders of the court, is complied with and fully performed when, after a verdict of guilty and judgment, and an order of commitment to the jail of the county on the failure of the defendant to give the bond, he is taken to the county jail and confined there in pursuance to the order of the court. (*Wheeler v. State*, 39 K. 163.)

97. The fact that the defendant is taken by the sheriff or his deputy into the court house yard to help trim the trees, or gather up and haul away the brush, and do other small jobs of work around the court house, and is permitted by the sheriff to go across the street and vote at an election, do not constitute an escape for which any liability is created on the recognizance given in pursuance of § 5 of the act. (*Wheeler v. State*, 39 K. 163.)

98. A prosecution under the act providing for the maintenance and support of illegitimate children is not local, but may be brought in any county or before any justice of the peace of the state; and the warrant issued by a justice of the peace may

go to and be served in any part of the state where the defendant may be found. (*In re Lee*, 41 K. 318.)

BIGAMY.

99. A defendant charged with the crime of bigamy, being on the trial and testifying in his own behalf, was required by the court to answer on cross examination whether he had not been consulted or advised by his counsel in regard to obtaining a copy of a decree of divorce alleged to have been granted prior to the second marriage, against the objection of such defendant that the communications between himself and his attorneys were privileged. *Held*, That the court erred, as the defendant had not referred to any consultation or advice in connection with his attorneys in his direct examination, and that the communications were privileged. Any communication which an attorney is precluded by statute from disclosing, his client cannot be compelled to disclose against his objection of privilege. (*State v. White*, 19 K. 445.)

100. On a criminal trial for bigamy, the court being satisfied that the jury could not agree, discharged them in the absence of the prisoner and his counsel, after they had been together for deliberation from four o'clock P. M. to six o'clock A. M., and had the record show that the discharge of the jury was granted after it had been made to appear to the court that the jury could not agree upon a verdict, and thereafter overruled the motion and plea of the prisoner interposed for his release and discharge on account of the action of the court. *Held*, That the motion and the plea were properly overruled. (*State v. White*, 19 K. 445.)

101. The books of record of marriage license kept by the probate judges of the several counties are evidence of all matters required by the statute to be contained therein. (*State v. White*, 19 K. 445.)

102. In a prosecution for bigamy, it is not necessary to allege

in the information or indictment the exact time and place of the first marriage. It is sufficient in that respect to allege and prove that the marriage relation existed between the accused and his first wife at the time of the second marriage. (*State v. Hughes*, 35 K. 626.)

103. In a prosecution, the deliberate admission of the defendant of a former marriage, coupled with cohabitation and repute, is evidence tending to prove an actual marriage, upon which a jury may convict. (*State v. Hughes*, 35 K. 626.)

104. The declarations of the defendant, made in his own favor respecting the first marriage, which formed no part of any statement or conversation called out by the state, and which were no part of the *res gestæ*, are inadmissible for the defense. (*State v. Hughes*, 35 K. 626.)

105. The district court may, until the term ends, revise, correct or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation. (*State v. Hughes*, 35 K. 626.)

BILLIARD TABLE.

106. Where a defendant is tried, convicted and sentenced before a police judge for the violation of a city ordinance, and the defendant then appeals to the district court, and there the original complaint is quashed, it is error for the district court then to permit a new and amended complaint to be filed in the district court and to allow the defendant to be tried, convicted and sentenced on this new complaint, against his objections. (*Burlington v. James*, 17 K. 221.)

BRIBERY.

107. Where a defendant, convicted of a misdemeanor before a justice of the peace, appeals to the district court, the statute requires the justice to certify up the original complaint to the dis-

trict court; and if the complaint is transmitted without such certification, the district court, in its discretion, may permit the defect to be remedied by amendment; but it is error to compel the defendant to go to trial against his objection, upon a complaint found among the papers of the case in the district court, which has not been certified to, nor authenticated in any manner. (*State v. Anderson*, 34 K. 116.)

108. A person charged with the crime of offering money to the prosecuting witness in a state case to absent himself, and not testify against the accused, testified on the trial of that case that he had offered the witness money, but coupled with this statements explanatory of his motive and intent in making the offer. On his own trial he was convicted principally on this statement. *Held*, That this statement was not a confession within the well defined legal meaning of that word implying an acknowledgment of guilt. (*State v. Crowder*, 41 K. 101.)

109. Letters to the accused, from persons entirely disconnected with the transaction, are not admissible as original evidence in his behalf. (*State v. Crowder*, 41 K. 101.)

110. An offer by the accused to prove by the postmaster that they had a conversation, in which it was agreed that the accused should offer the prosecuting witness money, is properly rejected, because it does not connect the offer agreed upon with the particular offer charged against the accused. (*State v. Crowder*, 41 K. 101.)

BURGLARY.

111. The offense of burglary and larceny, where each constitute a part of the same transaction, may both be charged in the same count, and the defendant may be found guilty of the larceny only. (*State v. Brandon*, 7 K. 106.)

112. Under the statutes of this state, an accessory before the fact may be charged, tried and convicted as though he was a

principal. Such statutes are not in conflict with the provisions of § 10 of the bill of rights. (*State v. Cassady*, 12 K. 550.)

113. An instruction which implies that the defendant is to have the benefit of *every* doubt is properly refused. He can claim only the benefit of *reasonable* doubts. (*State v. Cassady*, 12 K. 550.)

114. Where under an information charging a crime generally the verdict of the jury finds the defendant guilty as an accessory before the fact, and the whole testimony is not preserved in the record, it is impossible for this court to say there was error in refusing an instruction which apparently bears solely upon the question of defendant's guilt as a principal. (*State v. Cassady*, 12 K. 550.)

115. Where an instruction is asked, which in a distinctive statement presents two conditions of acquittal and there is error in one of these conditions, the court may properly refuse the whole instruction. (*State v. Cassady*, 12 K. 550.)

116. Whether one who outside the state is accessory before the fact to a felony committed within the state, can be punished in this state—*quære?* (*State v. Cassady*, 12 K. 550.)

117. The possession of stolen property, recently after it is stolen, is *prima facie* evidence of guilt, and throws upon the possessor the burden of explaining such possession, and if unexplained *may* be sufficient of itself to warrant a conviction. (*State v. Cassady*, 12 K. 550.)

118. While the recent possession is a circumstance pointing towards guilt, and therefore always competent as evidence, yet before it can be deemed sufficient standing by itself to warrant a conviction it must be so recent after the time of the larceny as to render it morally certain that the possession cannot have changed hands since the larceny. (*State v. Cassady*, 12 K. 550.)

119. Under our statutes, a failure to arraign the defendant and have a formal plea of not guilty entered is not such an omission and error as will entitle the defendant to a new trial or to an arrest of judgment, when it appears that the defendant was present in person and by counsel, announced himself ready

for trial upon the information, went to trial before a jury regularly impaneled and sworn, and submitted the question of guilt to their determination. (*State v. Cassady*, 12 K. 550.)

120. To constitute the crime of burglary there must be an entry as well as a breaking of the building, and an information is fatally defective which fails to charge an entry, and a judgment thereon must be arrested. (*State v. Whitby*, 15 K. 402.)

121. Burglary in the night time, as defined by § 63 of the act relating to crimes and punishments, does not include burglary in the day time, as defined by § 69 of the same act. (*State v. Behee*, 17 K. 402.)

122. Upon an information or an indictment for an offense consisting of different degrees, the jury can only find the defendant guilty of a degree inferior to the one charged, when the facts constituting the offense stated include the lesser offense. (*State v. Behee*, 17 K. 402.)

123. Where a defendant is charged in an information with the commission of the crime of burglary in the second degree, and in the night time, under § 63 of the act relating to crimes and punishments, a verdict that the defendant is guilty of burglary in the third degree is error, and will be set aside on appeal to the supreme court. (*State v. Behee*, 17 K. 402.)

124. Where a defendant, charged with burglary and larceny, makes a statement to the officer having him in charge, and to the owner of the stolen property, under a promise from them that he shall not be prosecuted, indicating to them where such property may be found, and the property is afterwards found in accordance with his statements; and it is shown conclusively by other evidence that the burglary and larceny were committed by some one: *Held*, That although such statement cannot be shown to the jury as a confession of the guilt of the defendant, yet that it may be shown to the jury as an admission of a fact tending to show that the defendant had some connection with the commission of the burglary and larceny charged against him. (*State v. Mortimer*, 20 K. 93.)

125. Where facts are proved beyond all controversy, it is not

error for the court to assume in its charge that they exist. (*State v. Mortimer*, 20 K. 93.)

126. It is not error for the court to refuse instructions which might mislead the jury, and particularly so where all the necessary instructions upon the subject are given by the court to the jury. (*State v. Mortimer*, 20 K. 93.)

127. Where the court, in charging the jury in a criminal case, reads a section of the statute, without incorporating the same in its written charge, but merely referring thereto, such failure to incorporate the statute in the written charge will not authorize a reversal of the judgment. (*State v. Mortimer*, 20 K. 93.)

128. Unauthorized statements made by counsel in addressing the jury referred to, and rule stated where counsel on both sides go outside of the record in their remarks. (*State v. Mortimer*, 20 K. 93.)

129. Where the clerk fails to attach his signature and seal to the jurat of an affidavit verifying an information, and the defendant pleads not guilty to the information while so defective, it is not error for the court to permit the clerk, before a jury is called to perfect the jurat by attaching his signature and seal; and this notwithstanding the only evidence that the county attorney in fact swore to the affidavit subscribed by him before the filing of the information is the oral statement of the clerk, not under oath, that such was the fact. (*State v. Adams*, 20 K. 311.)

130. A change of venue in a criminal case, on account of the bias or prejudice of the inhabitants of the county against the defendant, can only be had when the existence of such bias or prejudice is shown to the satisfaction of the court. And where a large number of affidavits and counter affidavits are offered, in which opinions are expressed in general language *pro* and *con* upon the question, the means of knowing the general sentiment of the community, as disclosed by the several affiants, is an important factor in determining the value of their testimony. And held, that the affidavits in this case do not disclose

such bias or prejudice as entitled the defendant to a change of venue. (*State v. Adams*, 20 K. 311.)

131. The cases of *State v. Thompson*, 5 K. 159, and *State v. Dickson*, 6 K. 209, are still authority on questions of continuance in criminal cases, for, though the rule of the supreme court upon which they were based has been repealed, in lieu thereof there is an enactment of the legislature of the same import. (*State v. Adams*, 20 K. 311.)

132. While evidence of the commission of one crime is incompetent on the trial of a party for another and distinct offense, merely for the purpose of inducing the jury to believe that defendant is guilty of the latter because he committed the former, yet evidence which tends directly to show the defendant guilty of the crime charged is not rendered incompetent because it also tends to prove him guilty of another and entirely different offense. And generally, where there is evidence of a conspiracy to commit a crime, and of its subsequent commission, the state may, and in support and corroboration thereof, show any act or conduct of the alleged conspirators intermediate the conspiracy and the crime, which apparently recognizes the existence of the conspiracy, reasonably indicates preparation to commit the crime, or preserve its fruits; and this, notwithstanding such special act of preparation was not the one discussed or agreed upon by the conspirators, and is rendered actually fruitless and unavailing by the unexpected interference of third parties, and also involves the commission of another and distinct crime. (*State v. Adams*, 20 K. 311.)

133. During the trial the jury were sent under charge of an officer to view the place where the crime was committed. Neither the judge, the clerk, the attorneys, nor the defendant accompanied them. The record does not show that defendant applied for leave to accompany them, or made any objection to their going, or presented this action of the court as ground for a new trial. *Held*, No ground for reversing the judgment of conviction, notwithstanding § 10 of the bill of rights provides that "in all prosecutions the accused shall be allowed to

appear and defend in person or by counsel, . . . to meet the witness face to face," and § 207 of the code of criminal procedure, that "no person indicted or informed against for a felony *can* be tried unless he be personally present during the trial." (*State v. Adams*, 20 K. 311.)

134. While the jury were in their room considering of their verdict, one of their number being wanted as a witness was brought by the sheriff, under direction of the court, into the court room, sworn and examined as a witness, and then returned to his fellows in their room. *Held*, No error. (*State v. Adams*, 20 K. 311.)

135. Where the court expressly charged the jury that they must be "satisfied of his (defendant's) guilt beyond a reasonable doubt," the jury could not have been misled or the defendant prejudiced by a statement elsewhere in the charge that the presumption of innocence "will protect the defendant unless the state has overcome it by such proof as satisfies the jury of his guilt." (*State v. Adams*, 20 K. 311.)

136. When the court, in reference to the testimony of an accomplice, advised the jury that it was unsafe to give it entire effect "unless he is so far corroborated as that the corroborating testimony shall render his statements credible;" and that the corroboration "need not be as to everything to which he has testified, but if he be so far corroborated that the jury are convinced that he has told the truth;" and also gives fully and clearly the reasons which render it unsafe to rely on such testimony: *Held*, No error, although it was not said in express terms that the corroboration should be as to some material fact. (*State v. Adams*, 20 K. 311.)

137. Though there be three degrees of burglary named in the statute, yet where the facts stated in the information constitute only the crime of burglary in the second degree, and the defendant could not be convicted of any other degree of burglary under it, a verdict finding the defendant guilty as charged, and not specifying in terms the degree of burglary, is sufficient,

and judgment can legally be pronounced upon it. (*State v. Adams*, 20 K. 311.)

138. Burglary, under § 68 of the act relating to crimes and punishments (Gen. Stat. 330, 331), may be committed in a "saloon building." (*State v. Comstock*, 20 K. 650.)

139. Where a defendant who has been found guilty of burglary moves the court for a new trial, upon the ground of improper statements made by the county attorney in his opening argument to the jury, and the only evidence introduced on the hearing of the motion tending to show what such statements were, were affidavits of defendant and his counsel, and the county attorney, and this evidence was conflicting, and the court overruled the motion for a new trial: *Held*, That the supreme court will, in reviewing the ruling of the district court on said motion for a new trial, presume that the controverted facts with reference to said statements were in accordance with that portion of conflicting evidence which is most in consonance with the ruling of the court below. (*State v. Comstock*, 20 K. 650.)

140. And where some of such statements of the county attorney seem to be improper, but it does not appear that they might have had any material effect upon the verdict rendered by the jury, the supreme court will not reverse the judgment of the court below merely because of such improper statements. (*State v. Comstock*, 20 K. 650.)

141. The detective having disclosed to the police the place of an intended burglary, the proprietor of the building, a saloon, upon the direction of the police, left the rear door, which was ordinarily fastened with a lock and bar, unlocked and unbarred, but closed, and at two o'clock at night the defendant, with the detective, entered through that door, the defendant lifting the latch and opening the door, and were arrested by the police and the proprietor, who were lying in wait. Upon the trial, the court refused to instruct that the lifting of the latch and opening of the door were, under the circumstances, no burglarious breaking, and left to the jury to say whether the pro-

prietor consented to the entry by defendant. *Held*, No error. (*State v. Jansen*, 22 K. 498.)

142. Where an instruction, purporting to give a definition of the crime charged, omits some essential element, it is erroneous; but where there is no dispute in the testimony but that the act omitted from the definition was actually done by the defendant, and when elsewhere in the instructions a correct definition is given, and also that he personally did the act is assumed in several instructions asked by the defendant, the error is not one affecting his substantial rights. (*State v. Jansen*, 22 K. 498.)

143. A criminal information which charges the commission of burglary by the breaking and entering into a certain store building in the night time with intent to steal, but which does not state or show who the owner of the building was, or whether it was owned or possessed by any person or not, is not sufficient. (*State v. Fockler*, 22 K. 542.)

144. On a trial in a criminal case, the existence of a railway corporation may be proved by general reputation. A *de facto* existence of a corporation is all that is necessary to be shown. (*State v. Thompson*, 23 K. 338.)

145. After the jury in a case of felony retired to consider their verdict, the bailiff, by request of a juror, and without the authority of the court, passed into the jury room an atlas of the county where the crime was alleged to have been committed. During the deliberations of the jury, the atlas was spread out before the jurors and examined by them. No showing was made by the prosecution that the rights of the defendant were not prejudiced thereby. *Held*, That the refusal of the trial court to grant a new trial was error. (*State v. Lantz*, 23 K. 728.)

146. In the case of *The State v. Taylor*, 20 K. 646, the word "liberally" has been interpolated without authority. In the original opinion, "reasonably" appears where "liberally" is reported. (*State v. Lantz*, 23 K. 728.)

147. Where a defendant was charged with having willfully,

forcibly, feloniously and burglariously broken and entered in in the night time a store of O. & S., such information is not fatally defective, upon a motion to quash, because it fails to describe more specifically the manner of breaking and entering the store. (*State v. McAnulty*, 26 K. 533.)

148. Where an information for larceny states only the collective value of sundry silver coins alleged to have been stolen, and then describes the coins as follows, to wit: "Current as money in the state of Kansas, consisting of five-cent pieces of nickel, commonly called 'nickels;' of quarter-dollar silver pieces, commonly called 'quarters;' of ten-cent silver pieces, commonly called 'dimes;' of half-dollar pieces, commonly called 'half dollars;' of one-dollar silver pieces, commonly called 'dollars;' of certain foreign coins, of various denominations;" and further alleges that "a more particular description of any and of all such money cannot be given, as informant has no means of obtaining knowledge:" *Held*, The information contains a sufficiently definite description of the property alleged to have been stolen, and if the defendant is convicted of stealing only a part thereof, and the jury find and in their verdict return the value of the part so stolen, judgment may be legally rendered upon the verdict. (*State v. McAnulty*, 26 K. 533.)

149. The supreme court will not reverse the judgment of a district court in a criminal action for merely allowing leading questions to be asked of witnesses, when there has not been such a manifest abuse of discretion on the part of the trial court as to make it apparent the defendant has been prejudiced thereby. (*State v. McAnulty*, 26 K. 533.)

150. The information charged that the burglary alleged was committed in breaking and entering the store of John C. Clark and Frank G. Sutton, partners doing business under the firm name of Clark & Sutton. The court, in its charge to the jury in regard to the ownership of the building, directed upon this point, that it was sufficient to find that the building broken and entered belonged to Clark & Sutton. There was no contest over the ownership of the store building, and the evidence

clearly established that the building in which the burglary was committed belonged to John C. Clark and Frank G. Sutton, partners as Clark & Sutton. *Held*, The court committed no material error in not repeating the full names of each member of the firm in its charge upon the question of the ownership of the building. (*State v. McAnulty*, 26 K. 533.)

151. In a criminal action, the jury returned their verdict of guilty against the defendant into court while the clerk and his deputy were absent. There were present at the time in the court, the presiding judge, the county attorney and the sheriff. Objection was made by the defendant to the reception of the verdict in the absence of the clerk. The court overruled the objection, received the verdict, and discharged the jury. There was no request by defendant to poll the jury, and the verdict was afterwards properly filed and recorded by the clerk. *Held*, That the reception of the verdict under the circumstances did not involve any material error. (*State v. McAnulty*, 26 K. 533.)

152. In the journal entry of the trial and judgment in a criminal action, in which the defendant was charged with felony, the clerk of the court omitted, by mistake, the names of certain jurors, whereby it appeared from the journal that the defendant was tried by a jury of nine persons only. The case was appealed to this court by defendant. Pending this appeal, the attention of the district court having been called to the omission of the clerk in the journal entry, the journal was duly corrected by the order of that court, so as to speak the truth. Thereafter, upon suggestion in this court of a diminution of the record, it was held competent to permit the transcript to be amended to correspond with the record as corrected. (*State v. McAnulty*, 26 K. 533.)

153. The lifting of a latch of a closed door and the pushing open of the door, with the intent expressed in the statute, is a sufficient breaking, within the meaning of the law, to constitute burglary. (*State v. Groning*, 33 K. 18.)

154. Where a defendant was charged with burglary, under § 63 of the crimes act, and it was shown upon the trial that the

outside door of the building or granary, which it was alleged the defendant broke and entered in the night time, was closed and latched a few hours before the crime was committed, and the next morning was found open, and certain oats and rye taken: *Held*, That the jury were justified in finding, upon this evidence, that there was an actual breaking and entry into the building within the meaning of the law. (*State v. Groning*, 33 K. 18.)

155. Where a certain instruction is asked for, but refused, and other instructions are given which fully embrace the instructions refused, as far as proper, no error is committed in the refusal. (*State v. Groning*, 33 K. 18.)

156. Sec. 69 of the act regulating crimes and punishments, when construed in connection with §§ 61 and 63 of the same act, provides that every person who shall be convicted of breaking and entering in the day time, any dwelling house or other building, or any shop, etc., in which there is not at the time a human being, with intent to commit a felony or any larceny, is guilty of burglary in the third degree. (*State v. Cash*, 38 K. 50.)

157. When the owner of a dwelling house, upon going to church in the daytime, leaves his house with the doors locked and the windows closed, with no one in it, and upon returning about an hour afterward finds the prisoner inside, with his shoes off, and in his stocking feet, going from the dining room to the cellar, and upon being told that he would be arrested, said, "It will send me to state's prison," and the prisoner admits that after entering the house he had stolen some milk and crackers, which he had eaten, *held*, the evidence sufficient to warrant the conviction of the prisoner of burglary in the third degree. (*State v. Cash*, 38 K. 50.)

158. Where a defendant in a criminal action, upon an appeal to the supreme court, files a record certified by the clerk of the district court to be a record of the evidence only, the supreme court cannot examine and determine the alleged errors occur-

ring upon the trial, presented in the brief filed for the defendant. (*State v. Cash*, 36 K. 623.)

COHABITATION.

159. The mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient to constitute marriage at common law; and such a marriage will be sustained in this state, where its validity is directly drawn in question. (*State v. Walker*, 36 K. 297.)

160. The legislature has full power, not to prohibit, but to prescribe reasonable regulations relating to marriage, and a provision prescribing penalties against those who solemnize or contract marriage contrary to statutory command is within legislative authority. (*State v. Walker*, 36 K. 297.)

161. Punishment may be inflicted upon those who enter the marriage relation in disregard of the prescribed statutory requirements, without rendering the marriage itself void. (*State v. Walker*, 36 K. 297.)

162. Under § 12 of the marriage act, all persons who enter the marriage relation and live together as husband and wife, without complying with the conditions and regulations of the act, are guilty of a misdemeanor, and subject to the punishment imposed by that section. (*State v. Walker*, 36 K. 297.)

CONCUBINAGE.

163. Where the court orders the venue of an indictment or information to be corrected, under the provisions of § 231 of the criminal code, the clerk of the district court in which the case is pending should make out a full transcript of the record and proceedings in the cause, including the order of removal, and transmit the same, duly certified under the seal of his

court, to the clerk of the court to which the removal is ordered. (*State v. Goodwin*, 33 K. 538.)

164. While two or more felonies may, under proper circumstances, be joined in one indictment or information, they must, as a general rule, be in separate counts. A less stringent rule applies to prosecution for misdemeanors. (*State v. Goodwin*, 33 K. 538.)

165. Where an information charges that a defendant took away a female under the age of eighteen years from her father, without his consent, for the purpose of prostitution and concubinage, there is a joinder of two distinct offenses in one count, and therefore the information is bad for duplicity. (*State v. Goodwin*, 33 K. 538.)

CONTEMPT.

166. The district court has no power to require that the books and records of the county treasurer and county clerk of one county shall be removed fifty miles from the place where they are usually kept, into another county, so that they may be used as evidence in a criminal action pending in this other county. Copies may be used where the original cannot be procured. (*State v. Smithers*, 14 K. 629.)

167. For sneering, insulting and disrespectful language, used by an attorney to a judge, before whom a matter is pending, concerning such matter and the judge's ruling thereon, the attorney may be punished by a fine, as for a contempt. (*In re Pryor*, 18 K. 72.)

168. Such language as the following, coming from an attorney to a judge, in a matter still pending before him: "The ruling you have made is *directly contrary to every principle of law, and everybody knows it*, I believe;" and that it is "my desire that *no such* decision shall stand unreversed in any court I practice in," is insulting and disrespectful. (*In re Pryor*, 18 K. 72.)

169. It is immaterial whether this language is used in an oral address in the hearing of others, or in a written communication to the judge. (*In re Pryor*, 18 K. 72.)

170. An attorney, as an officer of the court, is under special obligations to be considerate and respectful in his conduct and communications to the court or judge. (*In re Pryor*, 18 K. 72.)

171. A judge will wisely overlook any mere hasty, unguarded expression of passion or disappointment, even though disrespectful, or simply notice it by a reproof. But where an attorney insists upon a right to use such disrespectful language, or is in the habit of so using it, or fails, when his attention is called to it, to apologize therefor, it may become the clearest duty of the judge to punish him for contempt. (*In re Pryor*, 18 K. 72.)

172. On an appeal from an order punishing for contempt, the mere question of the advisability of the court's action is not the matter of consideration; it is the question of power, and whether the act or word punished is in fact a contempt. (*In re Pryor*, 18 K. 72.)

173. Where a defendant is attached and brought before the court or a district judge to show cause why he should not be adjudged guilty and punished for contempt in refusing to obey an order directing him to pay temporary alimony and suit money, the proceeding is of a criminal nature, and an appeal lies to the supreme court from the decision and judgment of the court or judge in such a proceeding, when the defendant is sentenced to imprisonment in the county jail until he complies with the order of the court. (*State v. Dent*, 29 K. 416.)

174. Where an attachment is issued in a proceeding as recited above, the defendant is entitled to be discharged if he shows his disobedience is not willful, but solely on account of his pecuniary inability, or some other misfortune over which he has no control. (*State v. Dent*, 29 K. 416.)

175. An objection to the decision of a judge at chambers should be reduced to writing and presented to the judge for his allowance at the conclusion of the hearing when the decision is

made, unless application is made for additional time, which may be given, but never to exceed ten days. If no time is asked or given at the conclusion of the hearing before such judge, the parties are concluded, and are not thereafter entitled to present for allowance and have settled and signed a bill of exception. (*State v. Burrows*, 33 K. 10.)

176. In proceedings in aid of execution, instituted under § 482 of the code, the judgment debtor cannot be required by order of the judge of the district court to appear and answer concerning his property outside of the county to which the execution against him was issued; but where the order was made and served upon the judgment debtor, requiring him to appear within the proper county, and afterwards by the consent of the parties concerned, and with the approval of the judge, the judgment debtor voluntarily appears in another county in the same judicial district and submits to an examination, which is reduced to writing, and signed by the debtor without objection, and the further consideration of the case is then adjourned to the county to which the execution was issued, and where the proceedings were instituted, and the judgment debtor there proceeds with the hearing without objection, and by general consent introduces and reads in evidence the testimony so taken and reduced to writing outside of the county, he thereby waives the irregularity of an examination in a county other than the one to which the execution was issued. (*State v. Burrows*, 33 K. 10.)

177. A judgment debtor may be committed for contempt for willful disobedience of an order made by the district judge in proceedings in aid of execution, requiring him to apply property in his possession, not exempt, to the satisfaction of a judgment rendered against him and upon which an execution has been returned unsatisfied. (*State v. Burrows*, 33 K. 10.)

178. Pending an appeal from an order judging an attorney guilty of contempt, and enjoining him from practicing in the district court until purged of contempt, where a stay of pro-

ceedings had been duly granted, the attorney is entitled to all his former privileges in court. (*Bird v. Gilbert*, 40 K. 469.)

179. A party to an action can compel a witness to give his deposition in the case prior to the trial, even though such witness resides in the county in which the action is brought; and where a witness duly subpoenaed to testify in a cause, before a notary public, in giving his deposition, refuses to answer certain questions propounded to him, for no other reason than that he is instructed by counsel not to do so, after having been instructed by the notary to answer them, he may be committed by the notary for contempt for such refusal. (*In re Merkle*, 12 K. 451, cited and followed; *In re Abeles*, 40 K. 27.)

180. The judge of the district court at chambers cannot legally hear and determine a prosecution in the nature of a contempt proceeding for an alleged violation of a peremptory writ of mandamus. (*State ex rel. v. Stevens*, 40 K. 113.)

COSTS.

(See also FEES.)

181. When any person has been convicted of crime, he is liable for all costs made, both in the prosecution and defense of the case, and this liability is not affected by § 22, act of March 6, 1862 (Comp. Laws, p. 564), on fees, etc. (*Shawnee Co. v. Whiting*, 4 K. 273.)

182. Where such person is insolvent, the county where the offense was committed is liable for all the costs made on behalf of the prosecution, together with fees for board of the criminal. (Comp. Laws, 281, 282, §§ 311, 318.) *Semble*, § 318 Crim. Code 1859 provides that the county would be liable for no other costs. (*Shawnee Co. v. Whiting*, 4 K. 273.)

183. *Held*, That § 22, act of March 6, 1862, providing that the fees of the clerk and sheriff, where the state fails to collect during the vacation following the sentence, shall be paid out of the county treasury, gives a new rule for the payment of the

costs made by defendant, of clerk and sheriff, and that where the state fails to collect as provided, the county is liable therefor. This section makes it the duty of the state to collect the costs of defendant during the vacation following the sentence, if possible. (*Shawnee Co. v. Whiting*, 4 K. 273.)

184. The construction put upon §§ 311, 318 (Comp. Laws, 281, 282), in *Shawnee County v. Whiting*, 4 K. 273, confirmed to the effect that § 318, providing that "whenever any person shall be convicted of any crime or misdemeanor, no costs incurred on his part shall be paid by the territory or county," limits the liability of the county as laid down in § 311 to the items named in § 318; and *held*, that costs of witnesses for defendant below, in case of conviction and his insolvency, cannot be collected of the county, such items not having been named in § 318. *Held*, That § 22, act of March 6, 1862, providing a new rule for payment of the fees of clerk and sheriff, does not affect the above conclusions. *Shawnee Co. v. Hanback*, 4 K. 282.)

185. The *per diem*, mileage and board of jurors, and the fees of bailiff necessarily in attendance upon them, in a criminal trial, though not technically costs in a case, are, as between counties, a burden that must be borne by the county wherein the crime charged was committed. So *held*, in a case where a change of venue was granted, and a term of court held expressly to try the case. (*Shawnee Co. v. Wabaunsee Co.*, 4 K. 312.)

186. When, in a prosecution of any person before a justice of the peace, for an offense less than felony, such person shall have been discharged "for want of sufficient evidence to convict or bind over," *held*, that it is error to tax the costs in such case to the county. *Held*, The prosecuting witness is liable for such costs, and it is the duty of the justice to tax them accordingly. (*Shields v. Shawnee Co.*, 5 K. 589.)

187. The complaining witness in a proceeding to prevent the commission of an offense is not in any event liable for costs. (*State v. Menhart*, 9 K. 98.)

188. A criminal action pending in Riley county for a crime alleged to have been committed there was taken on change of venue to Davis county, and there tried by a jury. More than three years thereafter, Davis county paid the jury fees, and then presented a claim therefor to Riley county for repayment: *Held*, That said jury fees were paid in violation of § 47 of the act relating to counties and county officers, and that Davis county cannot recover the amount thereof from Riley county. (*Davis Co. v. Riley Co.*, 9 K. 635.)

189. A county is not bound to pay a physician for medical services rendered by him in attending on prisoners confined in the county jail, unless such services were authorized by the county board. (*Roberts v. Pottawatomie Co.*, 10 K. 29.)

190. A sheriff is not entitled, as a matter of right, to extra compensation, over and above the amount fixed by law, for boarding prisoners, although he may have to carry the provisions fifty rods, and the water one hundred and sixty rods, and although the cells of the jail may be small and inconvenient, and although the weather may be cold and disagreeable. (*Atchison v. Tomlinson*, 9 K. 167; *Republic Co. v. Kindt*, 16 K. 157.)

191. Where C. was prosecuted for an offense in a justice's court, found guilty, and sentenced to pay a fine of five dollars and costs, but the justice did not, at the time of said sentence or afterward, issue any warrant for the arrest, detention, custody or commitment of the defendant, and on the next day the defendant gave to S. a mortgage on a horse, to secure the payment to S. of the amount of said fine and costs, with the understanding and agreement between C. and S. that S. should pay the same for C., and afterward S. did pay the same, and the whole transaction was in good faith: *Held*, That the mortgage is not void as being executed in violation of law or public policy, although S. may have been at that time an under sheriff, and may have acted as an officer of the justice's court during the trial. (*Converse v. Safford*, 17 K. 15.)

192. The board of county commissioners of Leavenworth county have the authority to make contracts for the services of guards at the county jail of that county, when, in their judgment, there exists a public necessity for the employment of persons for such purpose. (*Mitchell v. Leavenworth Co.*, 18 K. 188.)

193. Where a guard at the county jail of Leavenworth county was originally employed by the sheriff of the county, without consultation with the members of the board, and the services of the guard were necessary and required for the proper care and safety of the public jail and prisoners, and the services of the guard were rendered with the knowledge of the board, and the board, at a regular session, in consideration of such services, fixed the compensation thereof, and ordered that the person so employed should be paid said compensation, and had said orders duly entered upon the journal of their proceedings, and the services of the guard were of the full value of the compensation allowed, *held*, that the county is liable in an action to recover for such services the compensation so allowed by the board. (*Mitchell v. Leavenworth Co.*, 18 K. 188.)

194. On complaint of B., made under § 253 of the crimes act, A. was arrested for a willful disturbance of the peace. On the trial before a justice, A. was convicted of the offense, and thereupon appealed the case to the district court. Afterward the county attorney, with consent of the prosecuting witness, and by leave of the court, entered a *nolle prosequi* in the case, and the defendant was discharged. *Held*, That B., the prosecuting witness, is not liable for costs. (*State v. Campbell*, 19 K. 481.)

195. Costs are unknown to the common law, and are only given by statutory direction; and there being no provision of the statute requiring the county where the alleged offense is committed to pay the costs or fees in a criminal action of the character above stated, and disposed of as this one was, *held*, that the taxation of costs in this case to the county was erroneous. (*State v. Campbell*, 19 K. 481.)

196. Under § 27 of the practice act, in misdemeanor cases before justices of the peace, (Gen. Stat., ch. 83,) the county is in no event liable for the fees of the justice or witnesses in any case whereof jurisdiction is given by that chapter to justices of the peace, in which the defendant or complainant is adjudged to pay the costs, and it makes no difference as to the county's non-liability, whether the case ends in the justice's court, or is appealed to and defendant convicted in the district court. (*Johnson Co. v. Wilson*, 19 K. 485.)

197. B. was subpoenaed as a witness on behalf of the state in a criminal action pending in the district court of Shawnee county. He attended the court in obedience to the subpoena. A *nolle prosequi* was entered on the trial of the action by the prosecuting attorney, with the leave of the court. Afterward B. brought an action against Shawnee county to recover fees and mileage as a witness. *Held*, That the county is not liable. (*Shawnee Co. v. Ballinger*, 20 K. 590; *Parson Co. v. Miller*, 20 K. 595.)

198. The district court affirmed the judgment of a justice of the peace, taxing the costs in a certain criminal case against the prosecuting witness, who appeals to this court. Affirmed on authority of *Shields v. Shawnee Co.*, 5 K. 589. The doubt expressed by Mr. Justice VALENTINE in *State v. Reisner*, 20 K. 548 is disapproved. (*State v. McGilvray*, 21 K. 680.)

199. Where a defendant in a case of misdemeanor before a justice of the peace of Osborne county is found guilty, and sentenced to pay a fine and costs, and to be imprisoned in the county jail of Ellis county (there being no jail in Osborne county) until after such fine and costs are paid, and such fine and costs are not paid; and the sheriff then, upon a proper warrant, takes the prisoner to the county jail of said Ellis county, and in doing so pays railroad fare and stage fare: *Held*, That the county of Osborne is not liable to pay the sheriff for mileage, or for said railroad fare or stage fare, but that the defendant in the criminal action is liable therefor. (*Osborne Co. v. Honn*, 23 K. 256.)

200. The district court has no power, under § 16, ch. 82, Comp. Laws 1879, to adjudge any costs against the complaining witness. (*State v. Dean*, 24 K. 53.)

201. C., who was an important witness in a criminal case, and who resided within seventeen miles of the place where the trial was subsequently to be had, entered into a recognizance for his appearance at the next term of the court, to serve as a witness in the case, on the part of the state. Afterward, but before the next term of the court, he changed his residence, removing out of the state, and at least 1,600 miles from the place of the trial. He attended at the next term of the court, and was a witness in the case. *Held*, That he is entitled to receive mileage fees for the distance necessarily and actually traveled in going from the state line to the place of trial and returning, and no more. (*Lyon Co. v. Chase*, 24 K. 774.)

202. The proviso to § 13, ch. 39, Comp. Laws 1879, "that no more than ten dollars costs, in criminal cases, exclusive of witnesses', county attorney's and jury fees, shall be charged in any case," is not repealed, either in terms or by implication, by ch. 108, Laws 1881, the same being an act to amend § 19 of said ch. 39, and restricts to ten dollars the amount of costs which may be taxed in a justice's court for other than the parties named, in every criminal case brought in that court, whether for preliminary examination or final trial, and whether the party liable for payment be the defendant, the prosecuting witness, or the county. (*Keirsev v. Labette Co.*, 30 K. 576.)

203. Prior to the enactment of ch. 108 of the Laws of 1881, a county was not liable for costs in a prosecution wherein the accused was charged with a felony, but was convicted of only a misdemeanor that was included in such charge. (*Comm'rs v. Negbauer*, 34 K. 285.)

204. The district court has no authority to enforce by imprisonment the payment of costs, adjudged against the defendant in a proceeding to prevent the commission of an offense. (*In re Mitchell*, 39 K. 762.)

205. In a preliminary examination of a defendant charged with felony, the magistrate discharged the defendant, and found that the prosecution was instituted maliciously and without probable cause, and adjudged that the prosecuting witness pay the costs, and stand committed until they were paid. Failing to pay the costs, the prosecuting witness was committed to the county jail. *Held*, In a proceeding in *habeas corpus*, that the imprisonment was illegal. (*In re Heitman*, 41 K. 136.)

206. The complainant referred to in §18, ch. 83, Comp. Laws 1885, relating to procedure before justices in misdemeanors, is the party who makes to a justice of the peace, on his oath or affirmation, a complaint charging a person with the commission of a misdemeanor. (*In re Winne*, 41 K. 127.)

207. Under said § 18 of ch. 83, a justice of the peace has no authority to enter judgment against a witness for the costs that have accrued in the proceedings had upon a complaint charging a person with a misdemeanor, when such witness has not made, signed or filed with the justice any complaint in the cause. (*In re Winne*, 41 K. 127.)

208. When a prosecution for a violation of an ordinance of a city of the third class results in favor of the defendant, the fees of the police judge and of witnesses subpoenaed and who testified in behalf of the city should be taxed as costs against the city, unless such costs, for sufficient reasons, are adjudged against the prosecutor. (*City of Iola v. Harris*, 40 K. 629.)

COUNTERFEIT.

209. The securities of the United States are not included within the provisions of §§ 111, 112, 113 of the chapter on crimes, relating to counterfeiting; but *held*, that they are included within the provisions of § 119 of that chapter, which prohibits the counterfeiting of "any instrument of writing, purporting to be

the act of another, by which any pecuniary obligation shall be created." (*Riggins v. State*, 4 K. 173.)

210. Sec. 124 of that chapter (Comp. Laws, 309, 310) denounces its penalties against those who, with intent to defraud, offer or attempt to pass any forged or counterfeited instrument or writing, knowing the same to be forged or counterfeit, the forging or counterfeiting of which is in the previous sections declared to be an offense. (*Riggins v. State*, 4 K. 173.)

211. *Held*, That the fraudulent attempt to pass a counterfeit treasury note is an offense within the meaning of §§ 119, 124, although these instruments had no existence at the time of the passage of the act of the legislature. (*Riggins v. State*, 4 K. 173.)

CRIMINAL CODE.

212. Article 17 of the code of criminal procedure is not unconstitutional by reason of conflict with § 16 of art. 2 of the constitution. (*Woodruff v. Baldwin*, 23 K. 491.)

DISTURBING PUBLIC WORSHIP.

213. No appeal has ever been taken from the district court to the supreme court, and as the case is not a civil action, it is not rightfully brought to this court, and the petition in error must therefore be dismissed. (*Reisner v. State*, 19 K. 497; *McGilvray v. State*, 19 K. 481; *McLean v. State*, 28 K. 372; *State v. Elrod*, 35 K. 639.)

DOGS.

214. Statutes and ordinances may be passed regulating, restricting, or even prohibiting the running at large of dogs in cities; and this, although dogs are unquestionably property. The owners, keepers or harborers of dogs, in cities, may be required to register the same, and to pay a registration fee therefor, although this fee may in one sense be a tax, though not a tax within the meaning of § 1, art. 11 of the state constitution. Dogs in cities may be classified, and the owners, keepers or harborers thereof may be required to register all the dogs of one class, and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of the dogs of another class; and such owners, keepers or harborers of dogs may also be required to put collars around the necks of their dogs; and any dog found running at large in a city, in violation of the statutes or ordinances, may be summarily destroyed. All this is constitutional and valid, and is "due process of law;" and by the same no one is denied "the equal protection of the laws." (*State v. City of Topeka*, 36 K. 76.)

215. Statutes and ordinances, requiring two days' work on the streets of cities by each male person between twenty-one and forty-five years of age, or three dollars in lieu thereof, are not unconstitutional or void, although the two days' work imposed may in one sense be "involuntary servitude" imposed upon persons not convicted of crime, and although such work or money may also be assessments or taxes, though not assessments or taxes within the meaning of § 1, art. 11 of the state constitution, and although the provisions of such statutes and ordinances can be enforced only by proceedings before the police judge without a jury, and although no appeal can be taken from the decision of the police judge to a court with a jury, except by entering into a recognizance, with security, conditioned, among other things, for the payment of any fine and costs which may be adjudged against the appellant; nor are

such statutes and ordinance void because they provide for taking private property for public use, without compensation; nor because they place an embargo upon the right to vote; nor because the work, or the payment of the money, is imposed only upon a class of persons, and not upon all persons. (*State v. City of Topeka*, 36 K. 76.)

216. Sec. 10 of the bill of rights of the state constitution, which provides, among other things, that "in all prosecutions the accused shall be allowed . . . to have . . . a speedy public trial by an impartial jury," applies only to criminal prosecutions for violations of the laws of the state, and does not apply to prosecutions for violations of ordinary city ordinances, which have relation only to the local affairs of the city. (*State v. City of Topeka*, 36 K. 76.)

DRUNKENNESS.

(See LIQUOR.)

217. Chap. 104 of the Laws of 1883, punishing drunkenness in certain cases, is constitutional and valid, and the information in the present case charges an offense under it. (*State v. Brown*, 38 K. 390.)

218. Where a person is charged with the offense of being drunk in a public place, the defendant may show as a part of his defense that he became intoxicated through an honest mistake of fact. (*State v. Brown*, 38 K. 390.)

ELECTION.

219. The ordinary effect of the repeal of a statute is to put an end to all proceedings under it pending and undetermined. (*Gilleland v. Schuyler*, 9 K. 569.)

220. In the matter of pure legislation, and where nothing

results in the nature of contract or vested rights, no one legislature can bind another. (*Gilleland v. Schuyler*, 9 K. 569.)

221. The right to contest an election is not a vested right. Given by one legislature, it may be taken away by another. (*Gilleland v. Schuyler*, 9 K. 569.)

222. Chap. 104 of the General Statutes has a prospective application, and, until repealed, prescribes the rules for determining the effect and construction of the statutes of each legislature. (*Gilleland v. Schuyler*, 9 K. 569.)

223. The repeal by the legislature of 1871 of the act of 1869, for contesting an election for the location or relocation of county seats, did not put an end to proceedings in contests then pending under said act. (*Gilleland v. Schuyler*, 9 K. 569.)

224. On the trial of a contested county seat election, a witness cannot be allowed to state what other persons not parties to the record told him subsequent to the election, as to the number of times and the names under which they claimed to have voted. (*Gilleland v. Schuyler*, 9 K. 569.)

225. Where testimony is erroneously received, which may have influenced the court or jury in the findings or verdict, the error cannot be considered immaterial. (*Gilleland v. Schuyler*, 9 K. 569.)

226. Mere irregularities on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the election. (*Gilleland v. Schuyler*, 9 K. 569.)

227. Unless a fair construction of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely. (*Jones v. State*, 1 K. 297, approved; *Gilleland v. Schuyler*, 9 K. 569.)

228. An election is valid though there be but two judges appointed or acting. That one of the judges was not present at the polls when elected, and that the clerks were not appointed by the judges, will not vitiate the election when the judges recognized the clerks as properly acting, and both judges and

clerks acted during the election, receiving ballots, counting the votes, and making the returns without any question by any one as to their authority. They were at least officers *de facto*, and their acts as such officers cannot be questioned collaterally. (*Gilleland v. Schuyler*, 9 K. 569.)

229. Evidence of a preparation and an opportunity for, and an inclination to, wrong doing, are not of themselves sufficient to sustain a finding of such wrong doing. (*Gilleland v. Schuyler*, 9 K. 570.)

230. Secs. 10, 18 and 64 of the general election law, (ch. 36, Gen. Stat.,) relating to the challenging of persons offering to vote, the right of candidates and electors to be present in the room where the votes are received, prohibiting the keeping and selling intoxicating liquors at the election polls, are directory in their provisions, and a disregard of them will not necessarily vitiate an election. (*Gilleland v. Schuyler*, 9 K. 569.)

231. Election officers who willfully neglect or corruptly act, in the discharge of any duty under the election laws, are liable to prosecution and punishment for misdemeanor. (*Gilleland v. Schuyler*, 9 K. 569.)

232. Sec. 2 of art. 5 of the constitution of the state, as amended November 5, 1867, ordaining that no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of the government, shall be qualified to hold office in this state, until such disability shall be removed by law, operates upon the capacity of the person to take office; and if the disqualification is removed subsequently to the election and prior to the assumption of the office, the person, though ineligible under said provision at the time of the election, will not be disqualified when taking the office. (*Privett v. Bickford*, 25 K. 52.)

233. One P., who had voluntarily borne arms against the United States during the late rebellion, at the election on November 2, 1880, was ineligible under the constitution of the state to hold office. At such election, however, he was a candidate

for the office of sheriff, and received a majority of the votes of the electors therefor. Afterward, and before he received his certificate of election, and before demanding possession of the office, his disability was removed by law. *Held*, That he was entitled to the office of sheriff, and to enter upon and discharge its duties after the removal of such disability. (*Privett v. Bickford*, 26 K. 52.)

234. The registration law of 1879 (Laws 1879, ch. 80) was enacted in the discharge of the duty imposed on the legislature by § 4, art. 5 of the state constitution, and does not conflict with the other sections of said art. 5, or with § 17, art. 2. (*State v. Butts*, 31 K. 537.)

EMBEZZLEMENT.

235. Chapter 83 of the Laws of 1873, amending § 88 of ch. 31, General Statutes, includes within its provisions a county treasurer as liable to the penalties for embezzlement. (*State v. Smith*, 13 K. 274.)

236. In an information against a county treasurer for embezzling public funds in the county treasury, it is impossible and unnecessary to set forth the particular kind of funds embezzled, whether United States treasury notes or bank notes, or gold or silver. (*State v. Smith*, 13 K. 274.)

237. Where the accused was charged before the examining magistrate with embezzling \$67,000 of the funds of the county of Leavenworth, and in the information was charged with embezzling \$67,378.42 belonging to divers designated funds in the treasury of the county of Leavenworth, and a special plea was interposed that the defendant did not have a preliminary examination as to the embezzlement of any money or other thing belonging to any other person than the county of Leavenworth, nor did he waive his right to such examination, *held*, that there was no error in ruling upon these facts, that the plea was not a

bar to the further prosecution of the action under the information. (*State v. Smith*, 13 K. 274.)

238. An instruction that asserts, that "when it has been established that the funds or property have reached the hands of an officer, and that the same are not forthcoming when properly or legally demanded, the law presumes an illegal conversion of such funds or property, and the burden of proving the legal use of such property or money is upon the officer," is erroneous in this respect, that it declares that the law presumes a conclusion that is exclusively within the province of the jury. (*State v. Smith*, 13 K. 274.)

239. For the reasons stated in the case of *State v. Smith*, just decided, (13 K. 274,) each of the above entitled cases is reversed, and remanded for further proceedings. (*State v. Graham*, 13 K. 299.)

240. In a criminal prosecution, where the defendant has pleaded "not guilty" to the charge, and where the case is submitted to a jury and a verdict is rendered, and the court enters judgment that the defendant be discharged and go hence without day, *held*, that such verdict and judgment are conclusive, and that this court cannot on an appeal set aside or reverse the verdict or judgment. (*State v. Crosby*, 17 K. 396.)

241. An information which, in one count, charges the defendant with embezzling certain property received by him as the "agent, servant, employe and bailee" of the owner, is not objectionable on the ground that it charges two separate and distinct crimes. (*State v. Lillie*, 21 K. 728.)

242. The evidence discussed, and *held*, that the supreme court cannot say that the district court erred in holding that the evidence was sufficient to uphold the verdict of the jury. (*State v. Lillie*, 21 K. 728.)

243. The state is not an incorporation or corporation within the meaning of those terms as used in § 1, ch. 83 of the Laws of 1873. (*State v. Bancroft*, 22 K. 170.)

244. The expression "any agent," in the latter half of said section, is comprehensive, and the scope of that half of the

section is broad enough to include the agent of any party, whether private person, partnership, corporation or the state, who is guilty of the misconduct therein named. (*State v. Bancroft*, 22 K. 170.)

245. The cardinal canon of construction, to which all mere rules of interpretation are subordinate, is that the intent, when ascertained, governs. (*State v. Bancroft*, 22 K. 170.)

246. The defendant was in 1872 appointed, by the board of directors of the state normal school, agent for the sale of lands. *Held*, That such agency was not revoked by ch. 135 of the Laws of 1873, which placed the control of said school in a board of regents. (*State v. Bancroft*, 22 K. 170.)

247. To sustain a conviction under the last half of said § 1 of ch. 83, there must be proof of a demand. Such demand must also be made by some one authorized to make a demand, and not by a mere stranger. But to constitute a demand in any case in which there was an existing duty to pay, and a dereliction of duty in withholding payment, no particular form of words is necessary, but it is sufficient if the language plainly indicates to the party that he is called upon now to perform that neglected duty. (*State v. Bancroft*, 22 K. 170.)

248. A juror on his *voir dire* testified that he had neither formed nor expressed any opinion, and was without bias or prejudice. Two witnesses called at the same time testified that some months before they had heard him say that he was afraid defendant had got himself into a bad scrape; that he had got his foot into it, or words to that effect. On reëxamination he denied any recollection of such statement. A challenge was overruled, and he served as a juror. On a motion for a new trial, several witnesses testified that at different times they had heard similar statements. The juror denied making any such statements; asserted as to some of the witnesses that he was not on speaking terms with them, and had not been at the place named by them as the scene of these conversations. Part of this testimony was oral, and part in affidavit. The trial judge overruled the motion, and sustained the qualification of the

juror. *Held*, Under the peculiar character of this case, the fact that the questions involved were principally questions of law, and in view of the acts and conduct admitted and testified to by the defendant, and as the testimony was partly oral and partly in affidavit, that this court is not warranted in setting aside the judgment and granting a new trial because of this juror. (*State v. Bancroft*, 22 K. 170.)

249. A preliminary examination was had upon a complaint charging defendant with the embezzlement, *as city clerk*, of certain moneys of the city of Leavenworth. Afterward an information was filed containing several counts, each charging the embezzlement of the same moneys at the same time, and as the property of the same party, but differing in this, that one charged him with embezzling *as clerk*, another *as agent*, another *as servant*, and so on. *Held*, That a special plea that defendant had had no preliminary examination, except upon the charge of embezzling *as clerk*, and that therefore all the other counts should be stricken out, was properly overruled. (*State v. Spaulding*, 24 K. 1.)

250. Certain parties called as jurors testified on their *voir dire* that they had heard or read of the matters charged in the information, and had formed opinions thereon; but it appearing from the whole of their examinations that such opinions were not settled or fixed, and that they could give full and fair consideration to all the testimony, and be guided solely by it in their conclusions, it is held that the challenges were properly overruled. (*State v. Spaulding*, 24 K. 1.)

251. Defendant was city clerk. By ordinance, it was his duty to prepare and seal city licenses upon production to him of the receipt of the city treasurer, showing that the license money had been paid. In fact, for years the custom had been for the licensee to pay the money directly to the clerk and receive from him the license, and the clerk thereafter handed the money to the treasurer. The entire business was transacted by the clerk. This was done to the knowledge of the mayor, council, and other officers of the city. Defendant embezzled

certain of the moneys thus received by him. It did not appear that the city ever disavowed this authority, or ever made any effort to re-collect from the licensees these moneys. *Held*, That a conviction under an information charging the embezzlement of these as the moneys of the city must be sustained, and that though neither the city nor the licensees might have been concluded by his acts, yet that he, by the issue of the license, was estopped from denying that the moneys which he had received in payment therefor were the moneys of the city. (*State v. Spaulding*, 24 K. 1.)

252. Where a person fraudulently removes and secretes a gelding with which he has been entrusted as bailee, with intent to embezzle and convert the property to his own use, he may be prosecuted therefor under the provisions of § 90, ch. 31, Comp. Laws of 1879. (*State v. Small*, 26 K. 209.)

253. Where the information charges the embezzlement of a gelding which has been delivered to the accused as bailee, the information need not allege the value of the property, as the statute provides that, upon conviction therefor, the party so charged shall be adjudged guilty of larceny, and punished in the manner prescribed by law for stealing property of the nature so embezzled; and the punishment for persons convicted of stealing a horse or gelding is by confinement and hard labor not exceeding seven years. (*State v. Small*, 26 K. 209.)

254. Upon the trial, the defendant sought to introduce a conversation had by the prosecuting witness with another party, but as the proper basis for the impeachment of such witness was not laid, the court committed no error in refusing to receive such testimony, and committed no error in refusing to listen to the accused and counsel's statement as to what evidence he proposed to offer, when the character of the questions asked showed the evidence inadmissible. (*State v. Small*, 26 K. 209.)

255. Where an accused, charged with embezzlement of a gelding, had such gelding delivered to him as a bailee, in Sedgwick county, and thereafter fraudulently removed the animal,

for the purpose of applying it to his own use, from Sedgwick to Sumner county, and traded off the same in that county, and then, upon demand in Sedgwick county, refused to return the animal to the person entitled thereto, in accordance with the terms of the bailment, and falsely represented and stated that the animal had strayed away from him, *held*, the offense of embezzlement was complete in Sedgwick county, and the accused properly tried and convicted in that county. (*State v. Small*, 26 K. 209.)

ESCAPE, AIDING.

256. Where a person charged with the commission of a criminal offense is at liberty on bail, and his sureties, with his consent, but without any copy of the recognizance, deliver him to the sheriff, taking his receipt therefor, *held*, that the sheriff, without having any copy of the recognizance, cannot lawfully hold the accused in custody against his will, and therefore that the accused in such a case may escape from the custody of the sheriff without committing a felony, and also that any other person may assist him to escape without committing a felony. (*State v. Beebe*, 13 K. 589.)

257. A bill of exceptions properly allowed, signed and filed, and ordered to be made a part of the record, is not void because the clerk fails to make a journal entry thereof. (*State v. Fry*, 40 K. 311.)

258. Sec. 288 of the act relating to crimes and punishments, and concerning aid given to offenders to enable them to escape punishment, discussed. (*State v. Fry*, 40 K. 311.)

259. The evidence discussed, and held to be insufficient. (*State v. Fry*, 40 K. 311.)

260. The mere fact that a person arrested upon a criminal charge is hand-cuffed when taken before the examining magistrate, and so remains during the reading of the warrant and subsequent proceedings, the sheriff and a policeman being pres-

ent all the time, does not in anywise affect a waiver, then and there made by the accused, of a preliminary examination upon such criminal charge; and a plea in abatement to an information filed in the district court charging the accused with the same offense, grounded upon such fact, claiming that the waiver was made under duress, is not good, and a demurrer thereto is rightfully sustained. (*State v. Lewis*, 19 K. 260.)

261. Where a person charged with having committed a criminal offense is imprisoned in the county jail, awaiting his trial on such charge, breaks jail and escapes, and being re-arrested is thereafter tried upon such charge and acquitted, he cannot set up and maintain such acquittal as a bar to an information duly filed against him, charging him with the offense of breaking jail and escaping from lawful custody. (*State v. Lewis*, 19 K. 260.)

262. An information gave a copy of an order and judgment sentencing the defendant, J. H., to be imprisoned in the penitentiary, and then stated that while the defendant was "in the lawful custody of the sheriff," "under and by virtue of the order and judgment aforesaid, as entered of record," "and while going to the place of confinement aforesaid, to wit, to the penitentiary of the state of Kansas," "under and by virtue of said order and judgment aforesaid, the said Joseph Hollon did, at Marion Center," "then and there feloniously break such custody of the sheriff," "and did then and there escape therefrom;" but said information did not state or show that the sheriff had, at the time of such alleged escape, or at any other time, a certified copy of the said sentence, as is required under § 256 of the criminal code, (Gen. Stat., p. 861,) or that he had any other paper under which or by which to hold the said defendant in custody. The court below quashed said information. *Held*, That said information was defective, and rightfully quashed. (*State v. Hollon*, 22 K. 580.)

263. Penal statutes are to be strictly construed. (*State v. Chapman*, 33 K. 134.)

264. A person lawfully confined in a city prison for the vio-

lation of a city ordinance, under a judgment rendered by a police judge, cannot be convicted for breaking such prison and escaping therefrom, under the provisions of §§ 179 or 182 of the act regulating crimes and punishments. (*State v. Chapman*, 33 K. 134.)

EVIDENCE.

265. The finding of the jury upon the conflicting evidence as to the facts in this case will not be disturbed by this court. (*Winter v. Sass*, 19 K. 556.)

266. A convict in the state penitentiary is a competent witness in a civil action or proceeding. (*Winter v. Sass*, 19 K. 556.)

267. In an action brought by S. against W. to recover moneys of the former, alleged to have been stolen by the latter, an anonymous letter, received through the office by S., and admitted to have been written by W., and written in consequence mainly, as the latter stated in his testimony, of his hearing that S. was charging him with the larceny, was admitted in evidence. *Held*, No error, although the letter was principally filled with mere matters of abuse, and contained no direct notice of the charge, and only one expression which seems, and that not clearly, to have any reference to it. (*Winter v. Sass*, 19 K. 556.)

268. A counsel, in his argument to the jury, should confine himself in his statements of fact to the matters in evidence. If he travel outside the case, and assert to be facts matters not in evidence, he is guilty of misconduct, for which he may be punished personally. (*Winter v. Sass*, 19 K. 556.)

269. Sometimes, also, the interests of justice require that the verdict returned in his client's favor shall be set aside on account thereof. But there is no absolute rule to this effect. All that can be safely laid down is, that whenever in the exercise of a sound discretion it appears to the court that the jury may have been influenced as to the verdict by such intrinsic matters,

however thoughtlessly and innocently uttered, or that the statements were made by counsel in a conscious and defiant disregard of his duty, then the verdict should be set aside. (*Winter v. Sass*, 19 K. 556.)

EXTORTION.

270. Where a private citizen presents to the judge of the district court a complaint in writing and under oath, charging the defendant with the commission of a misdemeanor for which the punishment may be a fine not exceeding \$500, and imprisonment in the county jail not exceeding one year, and the complaint demands of the judge that a warrant shall be issued for the arrest of the defendant, and that the judge shall take cognizance of the complaint and hear and determine the case, and the judge refuses: *Held*, That no appeal lies to the supreme court from such refusal. *Quære*: Is not the decision of the judge, in such a case, correct? (*State v. Forbriger*, 34 K. 1.)

EXTRADITION.

271. Where the governor of the state demands a fugitive from justice—who is charged with having committed the crime of embezzlement in this state—from the executive of another state, upon the application and certificate of the county attorney of the county in which the offense was committed, and issues his warrant, under the seal of the state, directed to the agent recommended by the county attorney, commanding him to receive the fugitive and convey him to the sheriff of the county in which the offense was committed, such agent is entitled to recover the expenses which may accrue in his attempting, in good faith, to execute the warrant, although he does not find, and as a consequence does not receive, the fugitive in the state to which he is directed, and therefore does not convey

such fugitive to the sheriff of the county in which the offense was committed. (*Moon v. Butler County*, 30 K. 458.)

272. When the county attorney of a county in which the offense of embezzlement has been committed has made to the governor his application and certificate, as required by law, for the apprehension of the person charged with the offense as a fugitive from justice, and the governor thereon demands such fugitive from the executive of another state, and the agent is unsuccessful in finding or receiving the fugitive in such state, and thereafter receives information that the fugitive is in another and different state, and presents evidence to the governor of this fact, and the governor, being satisfied, issues, upon such original application and certificate, a second requisition and warrant, and thereafter the agent is successful in receiving the fugitive and conveying him to the sheriff of the county in which the offense was committed, the expenses which accrue in executing the second requisition and warrant are recoverable from the county where the offense was committed. (*Moon v. Butler County*, 30 K. 458.)

273. An alleged fugitive from justice, extradited from one state to another, can be prosecuted in the state to which he has been extradited, only for the offense for which he was extradited, until after he has had a reasonable time and opportunity afforded him to return to the place from which he was extradited. (*State v. Hall*, 40 K. 338.)

FALSE IMPRISONMENT.

(See also MALICIOUS PROSECUTION.)

274. Where a petition in the court below shows that in September, 1858, K., defendant below, was arrested by the sheriff of Madison county, under a warrant issued on the affidavit of M., by G., probate judge of that county, and taken from his dwelling, in Breckenridge county, and placed in charge of P., deputy sheriff, and was thus detained seven days, and that said

persons "caused the same to be done unlawfully, and then and there imprisoned the plaintiff (below) and kept and detained him in prison there, without any reasonable or probable cause whatever, for a long space of time," and where copies of the affidavit, warrant and sheriff's return are made part of the petition, as being all the proceedings in the case: *Held*, That a joint demurrer by the defendants (below), on the ground that "petition did not state facts sufficient to constitute a cause of action," was properly overruled. In such a case, the defendant must show affirmatively, not only a justification for the arrest, but the causes for the continued imprisonment. (*Mayberry v. Kelly*, 1 K. 116.)

275. Where an inferior court has jurisdiction of the subject matter, but is bound to adopt certain forms in its proceedings, from which it deviates, to the injury of a party, he has a remedy by action against all those who participated in the injury. (*Mayberry v. Kelly*, 1 K. 116.)

276. A demurrer is a pleading, as now used; is created by the code, and can only be used when it appears on the face of the pleading demurred to that one of the six causes exists, designated in the code. (*Mayberry v. Kelly*, 1 K. 116.)

277. An allegation in a demurrer "that the petition does not state that the alleged imprisonment, and the wrongs and injuries said to have been done him at the same time and place, were done without authority of law or unlawfully," *held*, not to be one of the causes provided for in the code, and can and must be regarded only as an objection that the petition does not state sufficient facts. (*Mayberry v. Kelly*, 1 K. 116.)

278. It is as much the duty of inferior courts, as of any other tribunal, to pass upon and determine the constitutionality of statutes, and to construe apparently conflicting laws, and decide which of the two shall prevail. (*Mayberry v. Kelly*, 1 K. 116.)

279. When an instruction, partly good law and partly bad, is asked as an entirety, the court may refuse the instruction

prayed for, or better, give so much of it as would be unobjectionable. (*Mayberry v. Kelly*, 1 K. 116.)

280. Under the act of 1867 (ch. 68) governing cities of the second class, the city marshal has no power or authority to appoint a deputy; and such power could not be conferred upon him by the mayor and council by order or resolution, but only by ordinance duly enacted as provided by the city charter. (*Prell v. McDonald*, 7 K. 426.)

281. In an action for false imprisonment, where the defendant justifies as an officer, in addition to the necessary and proper proofs in other respects, it is essential to a good defense that the defendant should be an officer *de jure*; but, in the absence of proof to the contrary, upon proof that he was an officer *de facto*, the court will presume that he was also an officer *de jure*. (*Prell v. McDonald*, 7 K. 426.)

282. Towns and cities are public, not private corporations; their powers are exercised for the general good of the community, and not for private purposes; and special laws (enacted by the territorial legislature) creating such corporations are public acts, of which courts will take judicial notice. (*Prell v. McDonald*, 7 K. 426.)

283. An officer making an arrest of an actual offender, on sufficient information, but without process, to answer to a complaint to be preferred, would not at common law be liable in damages therefor. (*Prell v. McDonald*, 7 K. 426.)

284. A mayor of a city of the second class, under the provisions of the charter of 1867, (ch. 68, art. 4, § 21,) was a judicial officer, clothed with judicial powers, and might lawfully exercise all the powers and jurisdiction conferred by said art. 4 upon police judges, to try and punish for offenses against the ordinances of his city, and have jurisdiction under the laws of the state, concurrent with justices of the peace of his county. (*Prell v. McDonald*, 7 K. 426.)

285. McDonald was mayor, and Files was deputy marshal of the city of Fort Scott. Files arrested Prell without a warrant, for an offense not committed within the presence of either Mc-

Donald or Files, and took him before McDonald, where he was tried before McDonald without a jury, without any arraignment or plea, and without any complaint, written or otherwise, except that Files told McDonald, orally, not under oath, that Prell was charged with "fighting, and disturbance of the peace," without stating when, where, with whom, or with what weapons the fighting was done, or whether it was a misdemeanor or a felony under the laws of the state, or a breach of a city ordinance; and McDonald found Prell guilty, fined him, and ordered him to be imprisoned; and Files imprisoned him. *Held*, That said proceedings are void, and that said McDonald and Files are liable to said Prell for said imprisonment. (*Prell v. McDonald*, 7 K. 426.)

286. At common law, no trial for any offense, except contempts, could be had unless upon a written complaint, attested by the oath of the complainant. Arrests might be made on view; but the magistrate or court could proceed thereafter only on a written complaint. The statute of 1867, (ch. 88,) providing for the government of cities of the second class, does not change this rule with respect to offenses committed against the laws of the state, nor offenses against the ordinances of the city. (*Prell v. McDonald*, 7 K. 427.)

287. The omission from a warrant, indictment, or other instrument, of the Christian name of the party intended to be charged, and which warrant, indictment, or instrument does not otherwise describe the person therein intended to be mentioned, is void. Such warrant affords no protection to the officer executing the same for an arrest or imprisonment made thereon. (*Prell v. McDonald*, 7 K. 426.)

288. When the acts of officers in arresting and imprisoning a person are void, they are liable to the party injured, although they may have acted in entire good faith. When an officer acts without authority, or exceeds his authority, he is liable, whether he acts maliciously or not. (*Prell v. McDonald*, 7 K. 426.)

289. Where a party sues for a wrongful imprisonment, and sets forth in his petition that the imprisonment was procured

by the defendant through the means of a void warrant, and through malice, and without probable cause, he may recover, provided he shows that a portion only (with respect to time) of the imprisonment was wrongful, and provided he shows either that it was procured on a void warrant or through malice, and without probable cause. (*Bauer v. Clay*, 8 K. 580.)

290. The owner of swine is required to keep the same from running at large, and if he omits to do so, his swine may be taken up and posted as strays; and the owner has no right to believe or suspect that the person who takes up such swine under the stray laws has stolen them, and a prosecution of such taker up, as for the larceny of said swine, is malicious and without probable cause. (*Bauer v. Clay*, 8 K. 580.)

291. Where a party prosecutes another willfully and maliciously, as for a larceny, and causes such other to be imprisoned for such alleged larceny, knowing that no crime has been committed by the person charged therewith, such party, in an action by the injured person for the wrongful imprisonment, ought to be required to pay damages for all the injuries which resulted from such wrongful imprisonment. (*Bauer v. Clay*, 8 K. 580.)

292. Where a private prosecutor, for the purpose of instituting a criminal prosecution against another person for grand larceny, makes an affidavit before a justice of the peace, charging such other person with committing the crime of grand larceny by stealing a steer of the value of \$35, and a warrant is issued on such affidavit, and the defendant is arrested thereon and imprisoned; and the prosecutor pays no further attention to the prosecution, and the prosecution is afterward dismissed and the defendant discharged, and there was no sufficient ground in law for said prosecution; and afterward the defendant commences an action on said facts against the prosecutor for false imprisonment, malicious prosecution and libel; and the prosecutor sets up as a defense to the action, that at the time that said affidavit was made, and warrant issued, the justice of the peace, upon the facts, decided that said defendant had committed the

crime of larceny, and advised that he be prosecuted therefor: *Held*, That said decision and advice of the justice are not a sufficient defense to the action. (*Dolbee v. Norton*, 22 K. 101.)

293. In an action for false imprisonment, the defendants justified by filing an answer stating that the imprisonment for which the plaintiff brought his action was had under and by virtue of an order of arrest issued in a civil action by a justice of the peace. The defendants set forth in their answer a copy of the affidavit upon which the order of arrest was issued, and from this copy it appears that the affidavit did not state any one of the grounds required by the statute to be stated in an affidavit for an order of arrest. *Held*, That the justification was not sufficient; that an affidavit for an order of arrest is jurisdictional in its character; and that where it does not state any one of the grounds required by the statute to be stated in an affidavit for an order of arrest, all proceedings afterward had under it, or by virtue thereof, or which are founded thereon, are void. (*Hauss v. Kohlar*, 25 K. 640.)

294. A complaint was filed, charging a misdemeanor under § 1, ch. 113, Comp. Laws of 1879, in cutting and carrying away timber. The complaint was filed before a justice having jurisdiction of the offense, was properly verified, followed the language of the statute, and was complete in every respect, except that it failed to describe the particular tract of land on which the timber stood, or to give the name of the owner of the land, or of the timber. Upon this complaint, which, upon examination, the justice in the first instance pronounced sufficient, a warrant was issued, which described the offense in the language of the complaint. Upon this warrant the party charged was arrested. *Held*, That as the defect in the complaint and warrant, if it be a defect, was one curable by amendment, and as there was enough stated to challenge judicial examination and consideration, that the proceedings cannot be adjudged void, and that an action of false imprisonment will not lie against the prosecuting witness. (*Wagstaff v. Schippel*, 27 K. 450.)

295. Where but one detention is complained of, the party

plaintiff may allege in his petition, and prove on the trial, such facts as show either a cause of action for false imprisonment, or one for malicious prosecution, or both. (*Wagstaff v. Schippel*, 27 K. 450.)

296. Where, in an action for malicious prosecution, it appears that there was a want of probable cause, and there is testimony bearing directly upon the question of malice, it is error for the district court to sustain a demurrer to the plaintiff's evidence on the ground that from its personal knowledge of the defendant, it does not believe that he was actuated by malice; because that is a question to be submitted to the jury for its determination, and the personal knowledge of the court should not influence its rulings upon a demurrer to the evidence, or upon a motion for a new trial. (*Wagstaff v. Schippel*, 27 K. 450.)

297. Whatever may be the rule in prosecutions for offenses which are simply *mala prohibita* and not *mala in se*, whenever the act complained of is, independent of any statute, essentially wrong and involves moral turpitude, the offense is not complete without the existence of criminal knowledge on the part of the accused. (*Wagstaff v. Schippel*, 27 K. 450.)

298. Where a party, acting in good faith and with reasonable prudence, cuts down a tree in the honest belief that it is growing upon his own land, or upon the land of one from whom he has bought it, he is not liable to a criminal prosecution under ch. 113 *supra*, for cutting and carrying away timber growing on the land of another; and this notwithstanding the fact that surveys made after the examination show that in fact the tree was growing on the land of the prosecuting witness, and not on the land on what it was supposed by the defendant to be. (*Wagstaff v. Schippel*, 27 K. 450.)

299. Corporations may be held liable for torts involving a wrongful intention, such as false imprisonment; and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons

committing like wrongs would be held liable. (*W. & W. Mfg. Co. v. Boyce*, 36 K. 350.)

300. Where the court, in an action for false imprisonment, gave the jury an instruction permitting them to award exemplary or punitive damages to the plaintiff upon testimony justifying such damages; and subsequently recalled the jury, and withdrew from them that instruction, making no other modification in the charge; and denied the application of the defendants to further address the jury after the instruction had been withdrawn: *Held*, That the ruling of the court in withdrawing the instruction, although erroneous, was beneficial to the interests of the defendants; and there can be no reversal unless the erroneous ruling is injurious to the party complaining. (*W. & W. Mfg. Co. v. Boyce*, 36 K. 350.)

301. A corporation is responsible for the tortious acts of its agent done in the line of his employment and in the execution of the authority conferred, although such corporation did not directly authorize the wrong action or subsequently ratify it. (*W. & W. Mfg. Co. v. Boyce*, 36 K. 350.)

302. The proceeding authorized by § 69 of the justices code is incidental to the action of replevin, and virtually provides for the punishment of a contempt, but the punishment therein provided cannot be inflicted without giving the party accused notice of the proceeding and an opportunity to defend; and a final judgment under that section, committing a party for contempt without giving him notice or allowing him a hearing and an adjudication upon the merits of the charge, is illegal and void. (*W. & W. Mfg. Co. v. Boyce*, 36 K. 350.)

303. The facts and circumstances of the case reviewed, and the award by the jury of one thousand dollars as damages for the wrong and injury inflicted by the false imprisonment is held to be fully justified, if not too small. (*W. & W. Mfg. Co. v. Boyce*, 36 K. 350.)

304. Chapter 140 of the Laws of 1885 is constitutional and valid, and the superior court of Shawnee county, created by it,

was a valid court from March 13, 1885, up to the first Monday of April, 1887. (*A. T. & S. F. Rld. Co. v. Rice*, 36 K. 593.)

305. A justice of the peace has no authority outside of his own township to entertain a criminal complaint made under § 36 of the criminal code, and issue a warrant thereon for the arrest of the accused; but if he does so act outside of his own township, his proceedings are void. (*A. T. & S. F. Rld. Co. v. Rice*, 36 K. 593.)

306. Where a petition, intending to state a cause of action for an unlawful arrest and imprisonment, sufficiently states a cause of action for malicious prosecution, and defectively states a cause of action for false imprisonment, and the evidence clearly shows a cause of action for false imprisonment, and the defendant is not misled, *held*, that the petition may be amended at any time during the trial so as to make it sufficiently state a cause of action for false imprisonment; and, *query*, is the variance between the petition and the proof material? (*A. T. & S. F. Rld. Co. v. Rice*, 36 K. 593.)

307. Where a petition sets forth a cause of action for an unlawful arrest and imprisonment, but does not set forth any sickness nor any facts from which it might be inferred, or from which the law would imply, that sickness would necessarily follow from the facts alleged, or from the arrest and the imprisonment, it is error for the court to permit evidence to be introduced, over the objection of the defendant, tending to show that after the arrest and the imprisonment the plaintiff became sick, and that the sickness was produced by such arrest and imprisonment. (*A. T. & S. F. Rld. Co. v. Rice*, 36 K. 593.)

308. The petition in an action for false imprisonment, which sets forth that a city marshal unlawfully, and without authority of law, placed iron handcuffs upon plaintiff's wrists, and took him and confined him in the city prison, states a cause of action against the marshal. (*Peters v. City of Lindsborg*, 40 K. 654.)

309. Police officers of a city, employed in the enforcement of its police regulations, are not regarded as the agents of the

city in its corporate capacity, and the city is not liable for their acts while so engaged. (*Peters v. City of Lindsborg*, 40 K. 654.)

310. A city council cannot ratify the unlawful acts of their police officers in enforcing police regulations, and thereby make themselves liable for such acts. (*Peters v. City of Lindsborg*, 40 K. 654.)

311. It is a general principle of law, that whenever a judicial officer acts within the scope of his jurisdiction, he is not liable, however erroneous his acts may be. (*Clark v. Spicer*, 6 K. 440.)

312. Whenever a justice of the peace, in a criminal case, has jurisdiction of the defendant, and of the offense intended to be charged, and the information states facts sufficient to show what offense is intended to be charged, and facts sufficient to require the exercise of judgment to decide whether any offense has been charged or not, and where the justice judicially determines that such information does state facts sufficient to constitute an offense, and proceeds in the action to a trial, conviction and sentence, under such information, he does not thereby render himself liable to an action, although he may have erred in his decision, and although the information does not state facts sufficient to constitute any offense. (*Clark v. Spicer*, 6 K. 440.)

313. Sec. 2 of ch. 49, approved Feb. 22, 1867, provides that cases of misdemeanor shall be tried in a justice's court by a jury of six men: *Held*, That whether said section is constitutional or not, a justice of the peace, acting judicially and within the scope of his jurisdiction, does not render himself liable to an action by trying a misdemeanor before a jury of six men only, instead of before a jury of twelve men. (*Clark v. Spicer*, 6 K. 440.)

314. In an action to recover damages for false imprisonment, evidence offered to show that the defendant, in committing the acts complained of, acted in good faith, and without malice, is not admissible for the purpose of diminishing the general and actual damages which the plaintiff has sustained. But where the plaintiff claims exemplary damages on ac-

count of willfulness or malice on the part of the defendant, such evidence is admissible in mitigation of such damages. (Per VALENTINE, J.) (*Comer v. Knowles*, 17 K. 436.)

315. False imprisonment may be committed without the slightest injury to character and reputation. Where, by illegal arrest and false imprisonment, the character or reputation of the party arrested is injured, and special damages are claimed for such injury, the facts with reference thereto should be pleaded specially and in detail. (*Comer v. Knowles*, 17 K. 436.)

FALSE PRETENSE.

(See also 405.)

316. Where an appeal is taken from a judgment in a criminal prosecution, and the transcript is not filed in the supreme court within thirty days after the appeal is taken, as prescribed by § 284 criminal code, the appeal will be dismissed. (*The State v. McEwen*, 12 K. 37.)

317. It is the duty of the courts to enforce a rigid and vigilant observance of the provisions of the statutes designed to preserve inviolate the right of trial by jury, and the purity of such trials. (*State v. Snyder*, 20 K. 306.)

318. After a verdict of guilty has been returned by a jury against an accused for the offense of obtaining by false pretenses the signature of a firm to a check of \$850, and in support of a motion for a new trial, affidavits were filed proving that the bailiff who had the jury in charge, and who had testified on the trial on the part of the prosecution to material facts against the prisoner, was with the jury in the jury room the greater part of the time while they were deliberating on their verdict; and the state made no explanation of the presence of the officer with the jury in their consultations together, nor any showing that the rights of the prisoner were not prejudiced by the acts and conduct of such officer and witness: *Held*, That

the verdict should have been set aside and a new trial granted. (*State v. Snyder*, 20 K. 307.)

319. The crime defined in § 94, ch. 31 of the act relating to crimes and punishments, is not that of making a false pretense, but the provision thereof is directed against one who obtains something, or, in other words, one who gets possession of something purposely by effort—that is, by false pretense. (*State v. Lewis*, 26 K. 123.)

320. An information purporting to charge the offense of obtaining money and property by means of false pretenses, under § 94, ch. 31, p. 339, Comp. Laws of 1879, that only alleges the accused was paid money, checks and drafts by the party alleged to be defrauded, and nowhere charges that the accused obtained anything, nor contains words equivalent thereto, is fatally defective, as not stating facts constituting a public offense. (*State v. Lewis*, 26 K. 123.)

321. An information purporting to charge the offense of obtaining money or property by the means of false pretense, under § 94, ch. 31, p. 339, Comp. Laws of 1879, must allege that the defendant did obtain from another, personal property, right in action, or other valuable thing or effects, and if the word *obtained* is not used, other words must be employed equivalent thereto, or having substantially the same meaning; otherwise the information is fatally defective, as failing to state facts constituting a public offense. (*State v. Lewis*, 26 K. 123.)

322. Where the pretenses which are false are, that the defendant was procuring a loan from one R., with which to pay certain notes, secured by a real estate mortgage which had been executed by him, and that he had come to the holder thereof for the purpose and with the intent to pay the notes, coupled with the promise to pay off the notes upon the execution of the release of the mortgage, and the possession of the notes and mortgages being given to him, *held*, to be within the statute. (*State v. Cowden*, 28 K. 269.)

323. A criminal information attempting to charge the defendant with the offense of attempting to obtain certain per-

sonal property by false pretenses, is not insufficient, because it fails in express terms to allege that the defendant failed in the perpetration of the principal offense, or that he was prevented or intercepted in the perpetration of the same. (*State v. Decker*, 36 K. 717.)

324. Where a criminal information charges the defendant with attempting to obtain from N. four promissory notes by means of a false and fraudulent draft drawn in favor of B. and indorsed by B., the evidence is not necessarily insufficient to prove the guilt of the defendant because it fails to show that B. was insolvent. (*State v. Decker*, 36 K. 717.)

325. In a prosecution for obtaining money under false pretenses, it is necessary for the state to negative specifically the false pretenses relied on to sustain the charge. (*State v. Metsch*, 37 K. 222.)

326. No pretenses other than those set out in the information can form a basis for a verdict of conviction. (*State v. Metsch*, 37 K. 222.)

327. To sustain the charge of obtaining money under false pretenses, it is essential to show not only that false pretenses were made, but also that the person who parted with the money relied upon the false pretenses made, and that the money was obtained by reason thereof. (*State v. Metsch*, 37 K. 222.)

328. The testimony in the record examined, and held insufficient to sustain the conviction. (*State v. Metsch*, 37 K. 222.)

329. An order by a magistrate, committing persons charged with an offense for trial in a county other than where the offense was committed, is erroneous, but where they have been given a proper preliminary examination, the erroneous order holding them for trial in the wrong county will not invalidate such preliminary examination, nor prevent the filing of an information thereon in the proper county. (*In re Schurman*, 40 K. 533.)

330. The act constituting Hamilton county a part of the twenty-seventh judicial district, operates to place Kearney county, which was unorganized and attached to Hamilton county for judicial purposes, within the same district; and un-

der the provisions of that act, (ch. 147, Laws of 1887,) a term of district court was authorized to be held in Kearney county at such time as the district judge should appoint, after the same had been organized. (*In re Schurman*, 40 K. 533.)

331. A charge that certain persons caused one of their number to have his life insured for the benefit of his wife, and then falsely pretended that the insured was injured, that he died and was buried, that his body was stolen from the grave, that all was done for the purpose of obtaining the insurance money from the insurer, and that they were frustrated in the attempt before the offense was consummated; without alleging to whom the false representations and pretenses were made, and without stating that the beneficiary in the policy was connected or co-operated with them in the attempt, or had any knowledge of their acts or purposes, and which does not state that the defendants intended to lead the beneficiary to believe that the insured was dead, or to procure her to present a claim for the insurance money, or to obtain from her the policy, or a transfer of the same, and which did not aver the means by which the money was intended to be obtained, does not constitute a punishable attempt to obtain money by false pretenses. (*In re Schurman*, 40 K. 533.)

332. *Held*, That the indictment stated an offense, advised the defendant of everything that he was required to meet, that although it was informal in some respects, yet that none of the substantial rights of the defendant were prejudicially affected by any of the supposed defects, and hence that the indictment was sufficient. (*State v. Palmer*, 40 K. 474.)

333. If it were shown that the trial was adjourned for two days, and the jury permitted to separate, it would still be presumed, in the absence of anything to the contrary, that the adjournment was for a sufficient reason, and that the court in every respect did all that was proper to be done in the case; but *held*, in this case that no such adjournment or separation is shown by the record. (*State v. Palmer*, 40 K. 474.)

334. Where the court urged the jury to agree upon a verdict,

but it is not shown that they agreed or rendered their verdict on that day or the next day, nor until the third day, *held*, no material error was committed. (*State v. Palmer*, 40 K. 474.)

335. Where an indictment alleges that the defendant obtained money by means of false pretenses, and the evidence shows that he obtained a check upon a bank, and that the drawer of the check went with the defendant to the bank, identified him, and that the bank then took the check from the defendant, paid him the money it called for out of money deposited in the bank by the drawer, and charged the same to the drawer's account, *held*, no variance in the proof. (*State v. Palmer*, 40 K. 474.)

336. *Held*, That no material error was committed either in giving or in refusing instructions. (*State v. Palmer*, 40 K. 474.)

337. In the absence of the regular judge of the district court, or if he makes no order to the contrary, a *pro tem* judge may adjourn the court from day to day until the case of which he has charge has been finally disposed of, he may adjourn the court to some other day for the trial or hearing of other cases set for trial or hearing during that term, and which have not yet been disposed of. (*State v. Palmer*, 40 K. 474.)

FEES.

(See also Costs.)

338. While a county attorney may recover additional compensation for attending any court, or doing any business, civil or criminal, that requires his personal attendance, outside of his own county, he cannot be allowed additional compensation for any advice he may give, or any consultation had with the officials of his county or other persons in discovering and preparing evidence within his county in the prosecution of a criminal action taken from his own to an adjoining county upon a change of venue. (*Huffman v. Greenwood Co.*, 25 K. 64.)

339. Under § 19, ch. 39, Laws of 1868, (Comp. Laws of 1879,

p. 446,) as amended in 1881, (Laws of 1881, ch. 108, § 1,) where a *nolle prosequi* is entered in a criminal action, and no judgment for costs is rendered against either the defendant or the prosecuting witness, or against any other person, *held*, that after the proper fee bill and affidavit have been made and presented to the board of county commissioners, the county is liable for the fees of the clerk of the district court which have accrued in such criminal action. (*Bedilion v. Cowley Co.*, 27 K. 592.)

340. The duty of keeping the county jail and supplying the prisoners committed thereto with board and lodging devolves upon the sheriff, and to him alone is the county liable for the same. (*Hendricks v. Chautauqua Co.*, 35 K. 483.)

341. Under § 331 of the criminal code, the board of county commissioners may allow a moderate compensation for medical services, fuel, bedding and menial attendance furnished for prisoners committed to the county jail, which shall be paid out of the county treasury; but the allowance of such claims is wholly discretionary with the county board, and the liability of the county for the same can only arise upon an order made by the county commissioners when duly convened and acting as a board. (*Hendricks v. Chautauqua Co.*, 35 K. 483.)

342. Where a defendant is tried for a felony and acquitted, a witness, who appeared at the trial on his behalf in obedience to a subpoena, may recover compensation of the defendant in an action brought against him for services performed at his request. (*Bennett v. Kroth*, 37 K. 235.)

343. Sec. 6, ch. 189, Laws of 1885, provides that a stenographer's fee shall be taxed in each case in the district court in any county in which a stenographer may be appointed; such a fee must be taxed as costs in every case in such county, though the stenographer is not called upon to render any services in that particular case. (*Beebe v. Wells*, 37 K. 472.)

344. When a stenographer's fee is taxed as a part of the costs in an action in which no services of a stenographer have been rendered, such an item is not a tax within the purview of § 1, art. 11 of the constitution of Kansas. It is a fee to the

public, imposed for the purpose of adjusting on an equitable basis as between a suitor and the public, the expenses of the administration of justice. (*Beebe v. Wells*, 37 K. 472.)

FELONY, COMPOUNDING.

345. Where a party charged another with embezzling his private funds, and threatened him with prosecution, and a note was given to the complaining party for the amount alleged to have been embezzled, it is no defense to answer that, "at the time the note was executed, he promised and agreed to and with the maker thereof, to compound and adjust the matter between them, to wit, the matter of which said charge of embezzlement was made against the said maker." There must be a positive and distinct averment that the receiver agreed and stipulated that he would conceal the felony, abstain from prosecution, and withhold evidence in relation thereto. (*Hoover v. Wood*, McC. 79.)

FIRE-ARMS.

346. A city of the third class, organized under ch. 60, Laws of 1871, has power to pass an ordinance prohibiting the discharge of fire-arms within its limits. (*City of Cottonwood Falls v. Smith*, 36 K. 401.)

FORGERY.

347. In a criminal action, an appeal cannot be taken by the defendant from the district court to the supreme court, until after a judgment has been rendered in the case; therefore, an appeal will not lie from an order of the district court, which overrules a motion to quash an information, or which sustains a motion for a continuance, while the action is still pending in the district court. (*State v. Freeland*, 16 K. 9.)

348. In charging statutory offenses, except in those cases in which the statute simply designates and does not describe or name the constituent elements of the offense, it is generally safe to use the language of the statute. (*State v. Foster*, 30 K. 365.)

349. In an information under § 134 of the crimes act, a charge that the defendant "passed, uttered and published" the forged instrument is a statement of fact and not of a conclusion of law, and is sufficient. (*State v. Foster*, 30 K. 365.)

350. Sec. 216 of the code of criminal procedure applies only to persons of skill or experts, and the rule of three witnesses therein named obtains only when the testimony is purely expert testimony. (*State v. Foster*, 30 K. 365.)

351. A forged check or order in words and figures, to wit: "LOUISBURG, KAN., Jan. 24, 1883.—M. REED: Pay L. Johnson, for corn, gross ——. tare —, net —, bu. —, at — cts., \$35.75.—M. REED, *Per J. H. R., Weigher*," of which the following words and figures were in writing: "Jan. 2—3—L. Johnson, for corn—\$35.75.—J. H. R.," and the remainder in print, was unlawfully, knowingly and feloniously sold and delivered by L. to C. for the consideration of \$35.75, with the intention on the part of L. to have the same uttered and passed: *Held*, That the check or order was of apparent legal validity, and therefore a forgeable instrument within the terms of § 129, ch. 31, Comp. Laws of 1879; and *further held*, that under § 137 of said ch. 31, as the instrument was partly printed and partly written, and as the signature was not complete until the blank for the attestation of the weigher was filled in by him with his initials, J. H. R., in writing, all was a forgery within the statute. (*State v. Lee*, 32 K. 360.)

352. A false instrument or writing, made out with criminal intent to defraud, which is good on its face, may be legally capable of effecting the fraud, even though inquiry into extrinsic facts or matters not appearing on its face would show it to be invalid, even if it were genuine; therefore, the forging

of such an instrument or writing is an offense under the statute. (Secs. 129 and 139 of the crimes act; *State v. Hilton*, 35 K. 338.)

353. One B. had his life insured in a mutual benefit insurance company of Ohio; one of the officers of the company received a notice that B. had died in this state; upon receiving the notice, he forwarded blanks for proof of death to the address of the beneficiary in the policy of the alleged deceased, the blanks being in the forms of proofs of death in use by the company; the defendant was appointed a committee to investigate the cause of the death of B., and after a short time the proofs of death were sent by him from this state to an officer of the insurance company in Ohio; these proofs of death were false and untrue, because in fact B. was not dead as alleged; the papers returned by the defendant to the company were headed "Official notice and proof of death;" on the first page there appears in blank, "the foregoing and the report of the committee, together with the certificates thereunto annexed," with certain questions purporting to be answered concerning the death of the alleged deceased; on page two is the certificate of the attending physicians, with the statement of an officer under oath that the physician is respectable, entitled to credit, and engaged in active practice; on the third page is a report of the council examining committee on the cause of the alleged death, and on the same page, an undertaker's affidavit and a clergyman's certificate — the first stating when the remains of the alleged deceased were interred, and the other giving the date of the funeral of the alleged deceased; on the fourth page are blanks for certain officers of the insurance company to sign, setting forth that they have examined the reports and certificates of the death of the member, and approved the same; the blanks on this page were never signed or filled up. Upon receiving the proofs of the alleged death the insurance company discovered that there was a material discrepancy in the proofs presented, in this: From the certificate of the attending physician, and the statement of

the committee appointed to examine the cause of the alleged death, it appeared that the alleged deceased died May 2, 1885, while the undertaker's affidavit and clergyman's certificate showed that the funeral of the alleged deceased and his burial were prior thereto, to wit, on March 4, 1885; the defendant was thereupon arrested for the forgery of the undertaker's affidavit and the clergyman's certificate. *Held*, That the false affidavit and certificate which the defendant executed must be treated as separate instruments and the same as though they were wholly detached from the other papers constituting the proofs of death; and being in the exact form required by the insurance company, and not being in any way invalid or defective upon their face, are the subject of forgery within the terms of the statute. (Secs. 129 and 139, *supra*; *State v. Hilton*, 35 K. 338.)

354. An information charging a person with forgery in the third degree under § 139 of the crimes act, should name the particular person intended to be defrauded, if such person is known. If, however, the effect of the forgery will not necessarily defraud a particular person, but will defraud some one, a general allegation of intent to defraud must be made. (*State v. Gavigan*, 36 K. 322.)

355. Where a mortgage of the homestead was executed by the husband, and to which he signed, or procured some one to sign, the name of his wife, and then procured a notary to certify to its acknowledgment by the wife, when in truth no such acknowledgment was made, and after an interval of six weeks the wife executed an instrument attempting to ratify the mortgage, *held*, that the mortgage creates no lien on the homestead property, not being given by the joint consent of the husband and wife, as required by art. 15, § 9 of the constitution, and that it is void. (*Howell v. McCrie*, 36 K. 636.)

356. Where, six weeks after the husband had signed, or procured some one to sign, the name of his wife to a mortgage on the homestead, and had procured a notary to certify to the acknowledgment of the same by the wife, when in truth no such

acknowledgment had been made, the wife, in the absence of her husband, and at the solicitation and upon the representations of the notary, signed and acknowledged before another notary an instrument attempting to ratify the mortgage, *held*, that the act of the husband in signing the name of the wife to the mortgage, or procuring some one to do so, and the act of the notary certifying to its acknowledgment, when in truth no such acknowledgment had been made, are criminal acts, and are incapable of ratification. (*Howell v. McCrie*, 36 K. 636.)

357. Any party to the action claiming a lien on the homestead property can properly raise the question of the validity of such a mortgage. (*Howell v. McCrie*, 36 K. 636.)

FRAUD.

358. Where an owner of land is legally disabled from selling, conveying or encumbering the same, except with the consent of the secretary of the interior; and where the law provides that "any conveyance or encumbrance of said lands done or suffered," except as provided, "shall be null and void," and such owner executes a deed without the consent of the secretary of the interior, and subsequently, after all disabilities and restrictions are removed, said owner executes another deed to another grantee for said land: *Held*, That the execution of the second deed and "willingly putting the same in use as having been made in good faith," is not such a legal fraud upon the first grantee as to prevent the second deed from having full force and effect. (Under § 98, crimes act; *Clark v. Akers*, 16 K. 166.)

FUGITIVE FROM JUSTICE.

(See EXTRADITION.)

GAMBLING.

359. Property of various kinds used in a gambling house was seized and ordered sold under the statute. On appeal, the order is modified so as to include only "the board covered with cloth, and thirteen cards painted thereon, called the lay-out, and the silver box." All the other property held not to be included within the meaning of the statute. In the supreme court, the following order was made: This cause came on to be heard upon a transcript from the record of the criminal court sitting in and for Leavenworth county, and was argued by counsel and considered by the court; on consideration whereof, it is ordered that this cause be remanded to the said criminal court of Leavenworth county, with directions to so modify the judgment heretofore rendered as to direct the destruction of the "board covered with cloth, and thirteen cards painted thereon, called the lay-out, and the silver box." (*Rice v. State*, McC. 650.)

360. The general words "gambling devices," in § 230 of the act regulating crimes and punishments, used after the several gambling devices especially enumerated therein, include only other implements of similar character, designed solely for gambling purposes. A pack of cards held not to be included. (*State v. Hardin*, 1 K. 474.)

361. An indictment charging that the defendant "did unlawfully suffer and permit a gaming device, to wit, a pack of cards, to be used for purposes of gambling and gaming in a house," etc., kept by him, *held*, not good on a motion to quash. (*State v. Hardin*, 1 K. 474.)

362. The criminal court of Leavenworth county, established March, 1862, had conferred upon it the same criminal jurisdiction that had been, by § 1 of an "act relating to the organization of courts of justice," (Comp. Laws, 454,) conferred on the district court of that county. (*Rice v. State*, 3 K. 141.)

363. Subdivision 5, § 2, of act of February 24th, 1864, amend-

ing the general law incorporating cities, does not confer upon the city council *exclusively* the power to prohibit and suppress games and gambling houses, etc., and cannot by implication be so extended as to nullify the plain provisions of the act establishing the criminal court of Leavenworth county. The intention was to give to the city authorities power concurrent with that of the state authorities to suppress these evils, and not to confine it to either. *It seems* the court which shall first obtain jurisdiction of the person may punish to the extent of its power. (*Rice v. State*, 3 K. 141.)

364. The recorder's court of the city of Leavenworth is not a court of record; has no grand jury, nor petit exceeding six, and for the highest crime cannot inflict a penalty beyond a fine of \$100, and imprisonment for one year. (*Rice v. State*, 3 K. 141.)

365. The first clause of § 14 of act of February 24, 1864, (Laws 1864, pp. 129, 130,) confers upon the recorder all the powers of a justice of the peace in criminal matters, and gives him concurrent jurisdiction with any other justice of the county, to inquire into the commission of offenses, held to bail, etc.; the *second* clause gives him exclusive jurisdiction under the city ordinances and of certain misdemeanors under the state laws committed within the city, and the *last* clause, providing that he "shall have exclusive original jurisdiction of all offenses against the laws of the state committed within the limits of said city," conferred upon him the exclusive power to institute preliminary examinations and hold to bail in such cases; and *held*, that it was not the intention of the legislature thereby to provide that the only tribunal in which a person could be tried for an offense committed in the city is before the recorder. (*Rice v. State*, 3 K. 141.)

366. It seems such a construction of the *last* clause would make it include what is provided for in the *second* clause, and it will not be supposed that the same thing was intended to be provided for in two succeeding clauses of the same section. (*Rice v. State*, 3 K. 141.)

367. Demurrer to a plea of jurisdiction, under an indictment in the criminal court of Leavenworth county, for keeping a gambling house in the city of Leavenworth, *sustained*. (*Rice v. State*, 3 K. 141.)

368. A question of the jurisdiction of the court may be presented at any time. (*Rice v. State*, 3 K. 141.)

369. The proper time to raise the question of the sufficiency of the indictment, before verdict, is by motion to quash; after verdict, by motion in arrest of judgment, and *it seems* it is not correct practice after the jury is sworn and trial commenced by placing a witness on the stand, to move to exclude all testimony under the indictment, on the ground that it does not charge a public offense. *Held*, That to overrule such a motion is not error. (*Rice v. State*, 3 K. 142.)

370. Section 7 of the act of February 12, 1864, abolishing grand juries, etc., does not abrogate the former law on that subject. The old statute provides the machinery; the new authorizes the judge to put it in motion, and both *held* to have a uniform operation within the meaning of § 17, art. 2, constitution of Kansas. (*Rice v. State*, 3 K. 142.)

371. The section on which the indictment was founded (§ 230, crimes act, Comp. Laws, 333,) having prohibited by name the setting up or keeping "faro banks," it was not necessary to set forth in the indictment that it was a gambling device, "adapted, devised and designed for the purpose of playing any game of chance for money or property." The legislature took cognizance that a "faro bank" was such a device. *Seemle*, Other devices than those named in the act must be charged to be "adapted, devised," etc. (*Rice v. State*, 3 K. 141.)

372. Where in such case it is alleged that "persons did bet and play at the game," an allegation that "money or property was bet, or lost or won on the device" is not necessary. (*Rice v. State*, 3 K. 141.)

373. In such case a charge by the court below to the jury, as follows: "To establish the fact of one being the keeper of a faro bank, it is sufficient to show that he appeared thus acting as the

one having control, in charge, superintending the same," was held to be good. (*Rice v. State*, 3 K. 141.)

374. The court did not err in refusing to charge substantially "that it (the court) had the right to determine whether the indictment charges an offense; that in the indictment before the court no offense is charged nor issue joined; therefore the jury must find for the defendant," that not indicating correct practice. (*Rice v. State*, 3 K. 141.)

375. Where the court charges the law correctly, it is not bound to repeat the charge in a different form. (*Rice v. State*, 3 K. 141.)

376. In this case, evidence having been offered on the trial tending to prove that the name of one person at least who was induced to bet and play at the game of faro at the faro bank was known to the grand jurors who found the indictment, and at the time of their finding such person was a witness at the trial, and the indictment having charged that the names of such persons were to the grand jury unknown, it was held, that the court did not err in refusing to charge the jury that "if the name of such person was known to the grand jurors, or could by reasonable diligence and inquiry have been ascertained, then the defendant must be acquitted." The common law rule involved in the charge is regarded by the court as technical within the meaning of § 276, crim. code, (Comp. Laws, 276,) and the reason for the rule, viz., to apprise the accused of the accusation against him, having failed, the person referred to having been a witness on the trial, the rule must cease. The object of the provision in that section of the statute is to make it the duty of the court to act on the axiom that "the rule ceases with the reason of it." (*Rice v. State*, 3 K. 143.)

377. Betting on elections is utterly prohibited by law. (Comp. Laws, 335, § 242; *Reynolds v. McKinney*, 4 K. 94.)

378. All moneys placed in the hands of stakeholder must be regarded as deposited in his hands without consideration, to be repaid on demand to the depositor or his legally attaching creditor; the share of each depositor is subject to attachment for his

debts at any time before it is paid over. (Drake on Attch., § 520; *Ball v. Gilbert*, 12 Metc. 397; *Reynolds v. McKinney*, 4 K. 94.)

379. Whether the depositor borrowed the money for the purpose of making an illegal bet, is immaterial, and cannot be inquired into. (*Reynolds v. McKinney*, 4 K. 94.)

380. Money in the hands of a stakeholder (betting on elections being prohibited by statute) must be deemed a mere naked deposit, liable to be reclaimed and recovered by each depositor, on demand at any time before it is paid over. (See *Reynolds v. McKinney*, 4 K. 94; *Jennings v. Reynolds*, 4 K. 110.)

381. Where, under § 240 of the act relating to crimes and punishments, which makes it unlawful for any person to bet upon a gambling device, or to bet upon any game played by means of any such gambling device, an indictment was drawn charging substantially as follows: The grand jurors "find that J. S. is guilty of the crime of gambling, for that the defendant did play cards for money, checks, and other valuable things, all of which is contrary to the statute," etc.; and the indictment did not in any other manner allege that the defendant bet on said cards, or that he bet at all, or that said cards were a gambling device, or that the defendant bet on a gambling device, or that he bet on any game played by means of a gambling device: *Held*, That the indictment was and is insufficient, and that the court below did not err in quashing it. (*State v. Stillwell*, 16 K. 24.)

382. Precisely the same questions are involved as in the case of *State v. Stillwell*, 16 K. 24, just decided; judgment affirmed. (*State v. Shewalter*, 16 K. 26.)

383. The question whether or not a grain deal is a gambling contract, is one to be determined by the jury under proper instructions, and where it is submitted to and determined by a jury, and their finding is supported by some evidence and is approved by the trial court, it will not be disturbed. (*Washer v. Bond*, 40 K. 84.)

GAME.

384. Section 6 of the act of the legislature of Kansas of 1876, entitled "An act for the protection of birds," so far as it prohibits the transportation from Kansas to other states of prairie chickens which have been lawfully caught and killed, and have thereby lawfully become the subjects of traffic and commerce, is unconstitutional and void, being in contravention of that provision of § 8 of art. 1 of the federal constitution which declares that "the congress shall have power to regulate commerce among the several states." (*State v. Saunders*, 19 K. 127.)

GRAND JURY.

385. The statute has provided (ch. 119, Comp. Laws, §§ 24, 25) two methods by which a grand jury may be filled to the required number by the district court, when for any cause a sufficient number shall not be present and answer on the calling of the panel. It is error in such case for the court below to order persons to be transferred from those duly served and returned as petit jurors to the grand jury, and to order other persons to be selected from the bystanders to complete the panel of the grand jury. But, *held*, that the criminal code does not allow a defendant, after conviction, for the first time to raise the objections, but, to be available, they must be raised before pleading to the merits. (*Montgomery v. State*, 3 K. 264.)

386. That the grand jury that found the indictment under which the defendant is arraigned was improperly constituted, is not a ground for a new trial, nor for an arrest of judgment under the criminal code. A motion to quash, plea in abatement or other dilatory plea would be the proper manner of raising the question. (*Montgomery v. State*, 3 K. 264.)

387. The record failing to show that the substantial rights of the parties have been affected, the jury having been composed of good and lawful men, the same that might have been selected

had the order been according to law, the supreme court will not interfere; the indictment *held* sufficient to sustain the judgment. (*Montgomery v. State*, 3 K. 264.)

388. The mere fact that the record fails to show that one of the petit jurors, who was duly sworn and tried the case, was summoned or selected from the bystanders, ought not to vitiate the verdict, the record showing that the whole twelve were good and lawful men of the body of the county, and failing to show that the defendant was prejudiced by the omission. (*Montgomery v. State*, 3 K. 265.)

HABEAS CORPUS.

389. The restraint of liberty, which is made the subject of inquiry by the writ of *habeas corpus*, is more than a mere moral restraint. It is any duress or restraint of the person whereby he is prevented from exercising the liberty of going when and where he pleases, whether it be by an officer of the law or a private individual. Persons discharged on bail will not be considered as restrained of their liberty, so as to be entitled to the writ of *habeas corpus* directed to their bail. (*Territory v. Cutler*, McC. 152.)

390. The return of the officer to the writ of *habeas corpus*, showing that at the time of the service of the writ, the petitioner was not in his custody, nor restrained of his liberty by him, and also showing that, by his own voluntary act, the petitioner had answered the demands of the commitment, by virtue of which he had been in custody, by giving a bail-bond, as required by law, to appear and answer to any indictment which might be found against him at the next term of the district court of the proper county, the writ was dismissed. (*Territory v. Cutler*, McC. 152.)

391. Under the code, § 660, a commitment for contempt may be inquired into in a proceeding of *habeas corpus*; *semble*, not so in many states. (*In re Mitchell*, McC. 256.)

392. Under our statute the power of the court in divorce cases is very great. The court not only decides the points in litigation as in other cases, but if a divorce is granted it settles, or ought to do so, the condition and many of the rights of persons not before it as parties. It must make provision for the guardianship, custody, support and education of the minor children of the marriage, and it has of necessity the power to enforce such order. (*In re Mitchell*, McC. 256.)

393. In divorce cases the court is charged with grave and responsible duties, which it must perform regardless of the wishes of the parties to the suit, and it has a right, on its own motion, to use all means necessary to make its orders effectual. (*In re Mitchell*, McC. 256.)

394. An order was granted, under § 644 of the code, restraining a party from disposing of his property during suit. No bond was filed. *Held*, That in such a case a bond is not required. There is a marked difference made in the code between injunctions and restraining orders. (Code, §§ 240, 241; *In re Mitchell*, McC. 256.)

395. An order being granted by the court restraining a party from disposing of his property during suit, no bond was filed (said order was granted under § 644 of the code): *Held*, That a bond in such a case is not required. (*In re Mitchell*, McC. 256.)

396. Questions properly appertaining to and requiring review or raising points of error should not be considered in proceedings in *habeas corpus*, for they would convert the writ of *habeas corpus* into a writ of error, and not one of constitutional liberty. (*In re Mitchell*, McC. 256.)

397. The supreme court has no greater power than the district court and probate court to inquire into the regularity of proceedings upon which a person is restrained of his liberty; and no court can inquire into "the legality of a warrant or commitment" issued from any court of competent jurisdiction, upon an indictment or information, before final trial and judgment. (*Ex parte Phillips*, 7 K. 48.)

398. Where an information has been filed in a court having jurisdiction of the offense, the defendant arrested and put upon trial, a jury sworn, and before testimony is offered a juror is withdrawn, the jury discharged, the case continued, and defendant committed for trial at the next term, *held*, no ground for the discharge of defendant by *habeas corpus*. (*Ex parte Phillips*, 7 K. 48.)

399. The statute contemplates a statement of facts in the application for a writ of *habeas corpus*, not mere conclusions of law; and before a court or judge should allow the writ, enough should appear in the application for the court to form some judgment on the case. (*Ex parte Nye*, 8 K. 99.)

400. The statute expressly declares (§ 671, ch. 80, Gen. Stat.) that no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, when the party is in custody upon any process issued on any final judgment of a court of competent jurisdiction. (*Ex parte Nye*, 8 K. 99.)

401. A party to an action can compel a witness to give his deposition in the case prior to the trial, even though such a witness resides in the county in which the action is pending. (*In re Abeles*, 12 K. 451.)

402. The code provides that the deposition of a witness may be used when the witness is absent from the county at the time of the trial, or when from age, infirmity, or imprisonment the witness is unable to attend court, or is dead. Giving the right to use a deposition under the contingencies named, gives the right to prepare for these contingencies. (*In re Abeles*, 12 K. 451.)

403. The giving of testimony, whether on trial, or by deposition, is not a privilege of the witness, but a right of the party. (*In re Abeles*, 12 K. 451.)

404. Where a witness duly subpoenaed to testify in a cause before a notary public, by giving his deposition, refuses to testify, he may be committed by the notary, for contempt, for

such refusal; and if he petition for a writ of *habeas corpus*, to be discharged from custody, the writ will be denied and the petitioner remanded to custody. (*In re Abeles*, 12 K. 451.)

405. Under § 672, (Gen. Stat. 1868, p. 763,) the judge or court issuing a writ of *habeas corpus*, on a petition complaining that the person in whose behalf the writ is applied for is restrained of his liberty without probable cause, may, even in case there is no defect in the charge or process, summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal. (*In re Snyder*, 17 K. 542.)

406. On the hearing and determination of a cause arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offense of having obtained money or property by false pretenses, the prosecutor, when examined as a witness, may testify that he believed the pretenses, and, confiding in their truth, was induced thereby to part with his money or property. (*In re Snyder*, 17 K. 542.)

407. It is not necessary to constitute the offense of obtaining goods by false pretenses that the owner has been induced to part with his property solely and entirely by pretenses which are false; nor need the pretenses be the paramount cause of the delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and, without them, the defrauded party would not have parted with the property. (*In re Snyder*, 17 K. 542.)

408. A pretense which is false when made, but true by the act of the person making the same, when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute. (*In re Snyder*, 17 K. 542.)

409. To hold a person for trial who is charged with obtaining money or property by false pretense, it must appear that the pretense relied upon relates to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient. (*In re Snyder*, 17 K. 542.)

410. The legislature has power to provide, that when upon the trial of a misdemeanor the jury shall find the defendant not guilty, and shall also find that the prosecution was instituted from malice or without probable cause, the justice may adjudge the costs against the prosecuting witness, and, if he fail to pay or give security for their payment, may commit him to the county jail until they are paid. Such an imprisonment would be upon due process of law, and after the imprisoned party had had his day in court, and would not conflict with section 16 of the bill of rights, which prohibits imprisonment for debt except in case of fraud. It follows that § 18, of ch. 83, Gen. Stat., is constitutional and valid. (*In re Ebenhack*, 17 K. 618.)

411. Where a defendant in a criminal prosecution, who is charged with perjury, is convicted and sentenced to imprisonment in the penitentiary "for the period of three years from the 19th day of September, A. D. 1874," and on the next day after his sentence, and before he is placed in the penitentiary, escapes from the custody of the officer then having him in charge and becomes a fugitive from justice, and is not rearrested until May 28, 1878, *held*, that on being rearrested, he may be taken to the penitentiary without further proceedings, and may be required to serve in the penitentiary for the full period for which he was originally sentenced. (*Hollon v. Hopkins*, 21 K. 688.)

412. The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and strictly speaking is not a part of the sentence at all. The essential portion of a sentence is the *punishment*, including the *kind* of punishment and the *amount* thereof, without reference to the time when it shall be inflicted. The sentence, with reference to the kind of punishment and the amount thereof, should as a rule be strictly executed. But the order of the court with reference to the time when the sentence shall be executed is not material. In no case will a term of imprisonment be deemed to have commenced prior to actual imprisonment, unless the actual imprisonment has been prevented by some cause other

than the fault or wrong of the convict. "Expiration of time without imprisonment is in no sense an execution of the sentence." (*Hollon v. Hopkins*, 21 K. 638.)

413. Although it might be a safer practice, where the convict escapes and remains absent until the whole of the time as fixed by the court for his imprisonment or for the execution of his sentence has elapsed, to take such convict again before the court that sentenced him, so that the court might resentence him, or in other words, "order the execution of its former judgment," yet such practice is not necessary. The records of the court show that the convict was sentenced, and the records of the penitentiary show that the sentence has not been executed; and nothing therefore remains to be shown, except the identity of the prisoner, and the reasons for the failure to imprison him at the proper time, and these may be shown as well on proceedings in *habeas corpus*, or in proceedings in the court where the sentence was originally pronounced. (*Hollon v. Hopkins*, 21 K. 638.)

414. Where, after the impaneling of the jury in a criminal case, the trial is terminated without a verdict, through any unavoidable casualty such as the death of a juror, or the judge, the defendant has not been put in jeopardy, and may be again brought to trial upon the same charge. (*In re Scrafford*, 21 K. 785.)

415. Where a criminal trial was commenced at one term, but not finished, nor the verdict of guilty returned until during a succeeding term, there has been at most only a mistrial, and the defendant cannot be discharged from custody on *habeas corpus*. (*In re Scrafford*, 21 K. 735.)

416. The act attaching territory on the western frontier, not as yet divided into counties, to an adjoining judicial district or county of such district, for judicial purposes, is within the general powers granted to the legislature, and not in conflict with any constitutional provision. (*In re Holcomb*, 21 K. 628.)

417. The guaranty in § 10 of the bill of rights to an accused of a trial by a jury of the county or district in which the offense

is charged to have been committed, must be construed as qualified by the power of attaching counties or undivided territory to a judicial district, and such attached counties or territory must be held to be a part of the district within the scope of said § 10. (*In re Holcomb*, 21 K. 628.)

418. Sec. 6 of ch. 79 of the Laws of 1873 is not rendered invalid by the constitutional provision in § 16, art. 2, that "no bill shall contain more than one subject, which shall be clearly expressed in its title." (*In re Holcomb*, 21 K. 628.)

419. Nor is said § 6 unconstitutional or invalid, because at the time of its passage the existing organization of Ford county was fraudulent and illegal, such existing organization having been by subsequent act of the legislature made legal and valid. (*In re Holcomb*, 21 K. 628.)

420. Where the court has jurisdiction of the person of the prisoner, and of the offense with which he is charged, and the verdict is valid, and the judgment pronounced is not void, but merely irregular, *held*, such prisoner cannot be relieved under a petition for *habeas corpus*. (*In re Petty*, 22 K. 477.)

421. The provisions of ch. 166, Laws of 1872, if intended to apply to offenses committed prior to the adoption of that act, and to operate retrospectively, are unconstitutional and void, as coming within the condemnation of the national constitution, prohibiting the passage of any *ex post facto* law. (*State v. Crawford*, 11 K. 32; *In re Petty*, 22 K. 477.)

422. Where L., desiring and intending to convey certain real estate to M., requests P. to draft and prepare a deed for that purpose; and P., pretending to do so, wrongfully and fraudulently drafts a deed conveying the property to himself, and then by false pretenses obtains the signature of L. to said deed, and by like false pretenses obtains and retains the possession of such deed, ostensibly for the purpose of having it recorded for L., but really to have it recorded for himself; and he is afterward prosecuted criminally under §§ 94 and 84 of the crimes act, for obtaining said signature under the said circumstances, and he is convicted and sentenced to imprisonment in

the penitentiary, and the sheriff holds him in custody under said conviction and sentence; and he then applies to the supreme court to be discharged from such custody on a writ of *habeas corpus*, claiming that said sentence is void, on the ground that the acts for which he was prosecuted, convicted and sentenced are not punishable under the laws of Kansas: *Held*, That said sentence is not void, and therefore that the applicant is not illegally restrained of his liberty, and therefore that he cannot be discharged on *habeas corpus*. (*In re Payson*, 23 K. 757.)

423. Courts of record have an inherent power to punish for disorderly conduct in the court room, resistance of their process, or any other interference with their proceedings which amounts to actual contempt. (*In re Millington*, 24 K. 214.)

424. Sec. 2 of ch. 28, Comp. Laws of 1879, places no limit on the power of the district court in matters of contempt, but only upon that of the district judge at chambers. (*In re Millington*, 24 K. 214.)

425. On May 13, 1880, an order was entered in the district court of Cowley county, adjourning the court until Monday, May 17th. That was the day fixed by law for the commencement of the term of the district court of Sedgwick county, a county in the same judicial district. That term commenced on that day, and the regular judge being absent, a judge *pro tem* was elected, who held court on both the 17th and 18th. The regular judge was present in Cowley county, and assumed to hold court pursuant to adjournment on the 17th and 18th, and at the time the district court of Sedgwick county was in session. *Held*, That such order of adjournment was void; that the term of the district court of Cowley county was, on those days, suspended or closed by the commencement of the term in Sedgwick county; and that the proceedings on those days in Cowley county were extra-judicial and void, and that a defendant tried and sentenced upon those days was entitled to a discharge upon *habeas corpus*. (*In re Millington*, 24 K. 214.)

426. *Per Curiam*: In brief, it is not necessary, in issuing each process, to recite all the facts conferring jurisdiction. It

is not the practice, nor do we deem it necessary, to make an exemplification of all the proceedings in a conviction for a misdemeanor before a justice, to constitute a valid *mittimus*. (Comp. Laws 1879, p. 775, § 9; *In re Goldsmith*, 24 K. 757.)

427. Where a person forges and utters, at Kansas City, Missouri, a time check upon a railroad company having its treasurer and treasury within this state, and such check is paid off by the agent of the company at Kansas City, who has authority to pay the valid obligations of the company, upon the supposition that such check was a true and valid instrument, the forgery is wholly consummated in Missouri, although afterward the agent sends the check to the treasurer of the company at Topeka, Kansas, and is given credit therefor on his accounts as so much cash. (*In re Ca r*, 28 K. 1.)

428. Where a person fraudulently and by false representations obtains money of a bank in the state of Missouri, upon a false and spurious time certificate, purporting to have been issued by a division roadmaster of a railroad company having its treasurer and treasury within this state; and thereafter the bank sends the certificate through its correspondent bank at Topeka for presentation to and payment by the company; and the treasurer of the company pays the same within this state: *Held*, That the offense is completed in the state where the party knowingly passes and receives the money on the false and spurious certificate. In such case the bank is not the agent in sending the certificate to this state for payment, since the party passing the same has gained his full object in Missouri, and prior to the transmission of the certificate. The subsequent payment thereof in Kansas to the holder would not be for the use and benefit of the guilty party originally passing the same. (*In re Carr*, 28 K. 1.)

429. The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act of the legislative power of a state; and it is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly and conclusively, and beyond all doubt, that the act

was not passed regularly and legally. (*State v. Francis*, 26 K. 724; *In re Vanderburg*, 28 K. 243.)

430. Where an act providing for the creation of a new judicial district in the state is challenged upon the ground that the journal of the house fails to show that two-thirds of the members of the house concurred in its passage, and from the confused and uncertain condition in which the journal appears, owing evidently to the haste in which it was kept, and the confusion attending the call of the roll and the changes of votes of the members, an examination thereof does not establish clearly, conclusively, and beyond all doubt that the act was not regularly and legally passed, the enrolled statute embodying the act in controversy will be deemed conclusive evidence of the regularity of the passage of the act, and also of its validity. And especially will the enrolled statute be considered conclusive, under such circumstances, where the act has been recognized as legally passed by both houses of the legislature; has been approved by the governor in the form it now appears enrolled; has been published under the authority of the secretary of state; has been recognized by the legislature as a valid act, by the appropriation of money for the salary of the judge of the judicial district created thereby; has been acted upon by the chief executive of the state in the appointment and commission of a judge for a district; has been recognized by the people of the counties composing the district in the election of a judge thereof; and has further been recognized upon several occasions as a valid act by the supreme court, in the examination and affirmation of judgments rendered in actions heard and tried in the judicial district created by the act. (*In re Vanderburg*, 28 K. 243.)

431. Chapter 100, Laws of 1881, entitled "An act to create the seventeenth judicial district, to provide a judge therefor, and for holding terms of court therein," approved March 5, 1881, was regularly passed by the house of representatives, and two-thirds of the members of the house concurred therein;

and such chapter must be regarded as a legislative act, enforceable by the courts of the state. (*In re Vanderburg*, 28 K. 243.)

432. Where it clearly appears from all the sources of interpretation that a provision of a statute has been inserted through inadvertence, it will be disregarded. (*In re Vanderburg*, 28 K. 243.)

433. Proceeding in *habeas corpus*. (*In re Bullen*, 28 K. 781.)

434. A proceeding in *habeas corpus*, brought by one who, upon an examination before a magistrate on a criminal charge, has been committed for trial, is in effect an appeal from such examination, and, like it, is to be considered a criminal case, within the scope of § 1, ch. 108, Laws 1881. (*Gleason v. McPherson Co.*, 30 K. 53,)

435. Where a petition sets out a conveyance and an agreement to reconvey, and alleges in general terms that the conveyance was made for the purpose of securing a certain sum of money, with interest, *held*, that it discloses a transaction in the nature of a mortgage; and this notwithstanding no note or other evidence of indebtedness is set forth, and there is no specific allegation of the making of a loan, or the creation of an indebtedness in any other way, and although the agreement to reconvey in terms recites that it is to become void at the expiration of a certain time. (*Overstreet v. Baxter*, 30 K. 55.)

436. I think that so far as this court has gone, the limit is placed here: you may show that the court in fact had no jurisdiction, because no process has been served; but when once it is admitted that the court did have jurisdiction, then I think the only evidence which can be received of the action of the court is its record, and that that record is conclusive against parol attack in any collateral proceeding. Suppose it be true that by fraud of a clerk an entry is interpolated improperly into the records of a court: of course such action would be a grievous wrong, but the remedy of the party is an appeal to the court in which the record appears, to have that interpolation stricken out. So long as that court permits it to remain,

other courts must treat it as the action of that court, and as conclusive upon the questions decided by it. (*In re Watson*, 30 K. 753.)

437. As between two parties, a written contract is conclusive as to the terms of their agreement, and can be overthrown only by proof of fraud or some similar matter. (*In re Watson*, 30 K. 757.)

438. *Per Curiam*: Petitioner entitled to an appeal from conviction in a municipal court where fine was less than twenty dollars. (*In re Rolfs*, 30 K. 758.)

439. The records of a court import absolute verity; and where jurisdiction over the person is conceded, parol testimony is inadmissible in a collateral proceeding, to prove that what the record shows was done by the court was not in fact done. (*In re Macke*, 31 K. 54.)

440. A justice of the peace has jurisdiction to try a misdemeanor case, although several counts, each charging a separate offense, are united in the same complaint, providing the offenses are all of the same general nature, and are each taken separately within the limits of its jurisdiction. (*In re Macke*, 31 K. 54.)

441. Where, upon the trial of a complaint containing several counts, the justice finds the defendant guilty on each count, and imposes a fine as to each count such as would be proper if the defendant had been tried upon that count separately, and no portion of the judgment has been satisfied, *held*, that although the aggregate of the fines exceeds five hundred dollars, a mittimus issued upon such judgment and sentence is not void, and the defendant is not entitled to a discharge in *habeas corpus*. (*In re Macke*, 31 K. 54.)

442. Where the county attorney files a complaint before a justice of the peace charging the defendant with the commission of a misdemeanor, and the complaint is sworn to by the county attorney on "information and belief," and is not sworn to in any other manner, and a trial is had before the justice, and the defendant found guilty and sentenced to imprisonment in the county jail, and he is so imprisoned: *Held*, On a

writ of *habeas corpus*, that the imprisonment cannot be held to be illegal, where no other ground exists for so holding than that the complaint was sworn to only on information and belief. (*In re Lewis*, 31 K. 71.)

443. *Habeas corpus* writ denied, on authority of *In re Lewis*, 31 K. 71. See also *Clark v. Spicer*, 6 K. 440. (*In re Varner*, 31 K. 324.)

444. Where a person files a complaint in writing before a justice of the peace, charging that a defendant has committed an assault and battery upon him, and the justice afterward discharges the defendant upon the ground that the complaint does not charge an offense, he has no authority to commit the complainant to jail until the costs are paid, or render judgment against him for costs upon the ground that the complaint was without probable cause. (*In re Stoneberger*, 31 K. 638.)

445. Sec. 671 of ch. 80 of the Compiled Laws does not prohibit a court having jurisdiction in proceedings by *habeas corpus* from examining the judgment or commitment of another court under which a person is restrained of his liberty; and if upon such examination it appears and the record shows that the court rendering the judgment was without authority to render it under some circumstances, or if the charge on which he was convicted and imprisoned does not constitute an offense for which punishment can be inflicted, or that the court had exceeded its authority, from discharging him. (*In re Dill*, 32 K. 668.)

446. To constitute a direct contempt of court, there must be some disobedience to its order, judgment or process, or some open and intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings, or with the administration of justice. (*In re Dill*, 32 K. 668.)

447. To constitute a constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the

court, or judge, or the administration of justice, into disrespect. (*In re Dill*, 32 K. 668.)

448. D. executed his recognizance to appear in the district court at a certain term, and submit to a trial on a criminal charge pending against him in such court. He did not appear at the term of the court at which he was recognized, but absented himself from the county where the court was held. Proceedings were taken against him for a contempt, and he was convicted and imprisoned. *Held*, That the facts stated in the charge against him, on which he was convicted, do not constitute a contempt for which he can be punished by fine or imprisonment. The judgment rendered was not warranted by law, and the court was without jurisdiction to render it, and the imprisonment under it is illegal, and the petitioner is entitled by proceedings in *habeas corpus* to be discharged from imprisonment. (*In re Dill*, 32 K. 668.)

449. The judge of the district court at chambers has no power or authority to review the action of the district court vacating and setting aside an order of arrest, and cannot revive an order of arrest that has been discharged by the court. (*In re Suppe*, 33 K. 588.)

450. As to whether it is within the power of the district court to rescind its action and restore an order of arrest after the term in which the order was vacated and the prisoner discharged — *quære*. (*In re Suppe*, 33 K. 588.)

451. The provisions of the code "in aid of execution," conferring upon the district judge the power to require a judgment debtor to appear before him to answer concerning his property, which he unjustly refuses to apply toward the satisfaction of a judgment rendered against him, and to order any money in his actual possession and under his control, not exempt by law, to be delivered up and applied toward the satisfaction of the judgment under which the proceedings are had, and to enforce said orders by proceedings for contempt in case of refusal or disobedience, are not violative of §§ 5, 10 or 16 of bill of rights of

the constitution of the state, or of the fifth amendment of the federal constitution. (*In re Burrows*, 33 K. 675.)

452. A judgment debtor is not entitled to a jury trial before a district judge, upon his examination under the provisions of the code "in aid of execution," as to whether he unjustly refuses to apply money in his possession and under his control, not exempt by law, toward the satisfaction of the judgment under which the proceedings are had. (*In re Burrows*, 33 K. 675.)

453. Where a judgment debtor has been examined before a district judge, in accordance with the provisions of the code "in aid of execution," and his examination has resulted in the disclosure that he has upon his person and under his control money not exempt by law, which he unjustly refuses to apply toward the satisfaction of the judgment under which the proceedings are had, and the judge thereupon orders him to deliver over sufficient of said money to satisfy the judgment and costs, and the judgment debtor willfully disobeys the order, the district judge may enforce the same by proceedings for contempt, and under such proceedings may commit him to the jail of the county until the judgment and costs, and the costs of the proceedings for contempt, are satisfied. (*In re Burrows*, 33 K. 675.)

454. Where a defendant in a criminal prosecution is sentenced to pay a fine and the costs of the prosecution, and to be imprisoned in the county jail until such fine and costs are paid, and it appears to the county board that he is unable to pay the entire amount of the fine and costs, the county board may, in its discretion, discharge such defendant absolutely from the imprisonment, or may discharge him upon the condition that he pay either the fine or the costs, or some portion of one or the other, or of both. (*In re Boyd*, 34 K. 570.)

455. In such a case, an unconditional pardon from the governor will not release the defendant from his liability to pay the costs or to be imprisoned therefor in case they are not paid. The judgment for costs, and that the defendant be imprisoned until such costs are paid, is no part of the punishment, but it

is merely a means of enforcing the legal obligation resting upon the defendant to pay the costs which he, by his original wrongful act and his subsequent acts, has caused to be made, and which have accrued in the prosecution, subsequent to the act for which he is punished, and have accrued not to the public merely, but to individuals, and are given to such individuals as *compensation for their services* performed in the prosecution. The right to these costs and the means for their collection are vested rights, which cannot be disturbed or abridged or lessened by any pardon which the governor may grant. (*In re Boyd*, 34 K. 570.)

456. Nor are such costs debts, within the meaning of the constitutional provision forbidding imprisonment for debt. In such a case, where the defendant has been imprisoned by the sheriff upon a certified transcript of the judgment, and has afterward been released conditionally by the county board, and the condition has not been complied with or fulfilled, the sheriff may again imprison the defendant upon the same transcript. (*In re Boyd*, 34 K. 570.)

457. That portion of § 2 of ch. 119 of the Laws of 1885, "An act to regulate the terms of court in the sixteenth judicial district, and repealing all acts in conflict herewith," which provides that the unorganized counties of Clark and Meade shall be attached to the county of Comanche for judicial purposes, is not expressed in the title to the act, and is unconstitutional and void. (*In re Wood*, 34 K. 645.)

458. The action of the legislature in detaching territory from an organized county, and including it within an unorganized county which is not attached to an organized county for judicial purposes, will operate to abolish any township organization existing upon the detached territory, and to oust from office all township officers, including justices of the peace, resident therein. (*In re Wood*, 34 K. 645.)

459. Where a prisoner is held to answer for a criminal offense, and the district court refuses to grant his application for discharge, made by him under the terms of § 221 of the crimi-

nal code, and instead thereof remands him to jail until bail is given, the order of the court cannot be reviewed or reversed, or the prisoner discharged, by a proceeding in *habeas corpus* before the supreme court. (*In re Edwards*, 35 K. 99.)

460. Where an information was filed against E. for the offense of murder, one day prior to the commencement of the regular term of the district court for 1885; and at such May term of the court, against the objection of the state and the defendant, the court attempted to remove the case for trial to another county, in another judicial district, upon the ground that the judge was disqualified to preside, on account of his prejudice; and such defendant was held to answer on bail to the district court of such other county; and thereafter the September and November terms of the district court where the information was filed were held, without the defendant being tried, and in December the jury were discharged, in his absence, but while his attorneys were present, who refused to appear or answer in any way for him; and the defendant did not at any one of the terms of said court ask or announce himself ready for trial, but made application on the last day of the November term of the court for his discharge, because he had not been brought to trial within the time limited in § 221 of the criminal code: *Held*, That the court committed no error in denying the motion, as the state announced itself ready to proceed at once with the trial, and the court decided that there was not time, during the remainder of the term of court, for the trial of the case upon its merits. (*In re Edwards*, 35 K. 99.)

461. An appeal in a criminal action can be taken by a defendant only after judgment, and an intermediate order of which he complains can be reviewed only on such an appeal. (*Cummings v. State*, 4 K. 225; *State v. Freeland*, 16 K. 9; *State v. Edwards*, 35 K. 99.)

462. An appeal will not lie from an order of the district court refusing an application of a defendant, charged with a criminal offense, for his discharge, under the provisions of § 22 of the criminal code, where the court remands the defendant

into custody until he gives bail, and continues the case against him for trial at the next regular term. (*State v. Horneman*, 16 K. 452; *State v. Edwards*, 35 K. 99.)

463. The mere filing of a complaint before a magistrate charging the commission of a felony, upon which no warrant is issued nor arrest made, is not such a commencement of the prosecution as will take the case out of the operation of the statute of limitations. (*In re Griffith*, 35 K. 377.)

464. Imprisonment in the state penitentiary does not fall within any of the exceptions of the limitations upon criminal prosecutions, and, therefore, the time of imprisonment of the accused within the state which passes before a prosecution is begun cannot be excluded from the statutory period of limitation. (*In re Griffith*, 35 K. 377.)

465. Where a defendant charged with murder in the first degree waives a preliminary examination for such offense, he not only waives his right to be let to bail, but also to have the facts of the alleged offense examined into on *habeas corpus*; but where said waiver is made under fear of personal violence, he will not be estopped by reason of such waiver. (*In re Malison*, 36 K. 725.)

466. A person charged with murder in the first degree is entitled to be let to bail where the proof is not evident, nor the presumption great. (*In re Malison*, 36 K. 725.)

467. A witness, giving his deposition, who is imprisoned on the mittimus of a notary public for failing to produce papers in his possession, will be discharged on *habeas corpus* when it clearly appears that the papers and testimony sought to be produced are incompetent and inadmissible. (*In re Beardsley*, 37 K. 666.)

468. Whether a notary public in Kansas, who is taking a deposition to be used in a case pending in the state court of Missouri, upon a notice, has authority to commit a witness for refusing to produce papers under a *subpœna duces tecum* — *quære*. (*In re Beardsley*, 37 K. 666.)

469. The taking of the deposition of a party in a pending case, merely to fish out in advance what his testimony will be, and to annoy and oppress him, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process; and a party committed by a notary public for refusing to give his deposition in such a case will be released on *habeas corpus*. (*In re Davis*, 38 K. 408.)

470. Laws enacted by the same legislature about the same time and concerning the same subject matter, being *in pari materia*, are to be taken and considered together in order to determine the legislative purpose and arrive at the true result. (*In re Hall*, 38 K. 670.)

471. Construing the provisions of the legislation relating to Garfield county, found in chapters 81, 132 and 142 of the Laws of 1887, by this rule, they provide that Garfield county should be attached to Hodgeman county for judicial purposes until organized, and no longer; after which time regular terms of the district court should be held in Garfield county, at the prescribed times. (*In re Hall*, 38 K. 670.)

472. Upon an application for a writ of *habeas corpus*, where the petitioner has been committed as for a contempt in failing to obey an order made in proceedings in aid of execution, if the officer had jurisdiction in the matter, his orders, so long as they are within the authority conferred upon him, cannot be inquired into, although they may have been irregular and erroneous. (*In re Morris*, 39 K. 28.)

473. After the proceedings had been regularly instituted before a probate judge in aid of execution, and a receiver appointed, the jurisdiction of such judge continues until all orders concerning the property of the judgment debtor are fully obeyed. (*In re Morris*, 39 K. 28.)

474. Where a person under indictment or information for crime, and committed to prison, is not brought to trial before the end of the second term of the court having jurisdiction of the offense which is held after such indictment or information is filed, he is entitled to be discharged, so far as relates to

the offense for which he is committed, if the delay does not happen upon his application, and is not occasioned by the want of time to try the case at such second term; provided it further appears that the delay is not caused to enable the state to procure material evidence for a trial at the succeeding term. (Crim. Code, §§ 220, 222.) (*In re McMicken*, 39 K. 406.)

475. A person who is imprisoned on an indictment or information may be discharged from imprisonment under *habeas corpus*, if he has applied to the district court for his discharge, because he has not been tried in accordance with § 220 of the criminal code, and it clearly appears by the record that the court erroneously denied his application, and refused his discharge. (*In re McMicken*, 39 K. 406.)

476. In the matter of the petition of William T. Edwards, 35 K. 99, modified and corrected. (*In re McMicken*, 39 K. 406.)

477. In an action to recover the possession of specific personal property, the court, or judge in vacation, may, for good cause shown, before judgment, compel the delivery of the property to the officer or party entitled thereto by attachment, and may examine the defendant as to the possession or control of the property. (Civil Code, § 188.) (*In re Farr*, 41 K. 276.)

478. If the defendant, after the commencement of an action to recover the possession of specific personal property, willfully removes or conceals the property, with the intent that it shall not be found or taken by the sheriff, an order of attachment may be issued by the court or judge against the defendant to compel the delivery of the property, upon an application of the plaintiff therefor, supported by affidavit showing such removal or concealment. (*In re Farr*, 41 K. 276.)

479. Where the attachment of a defendant is ordered by a district judge at chambers, or in vacation, under the provisions of § 188 of the civil code, the order of the judge should be entered by the clerk in the journal of the court where the action to recover the personal property is pending, and the commitment of the defendant should be issued in the name of "the

state of Kansas," by the clerk of the court, and signed by him, with the seal of the court attached. (*In re Farr*, 41 K. 276.) [April, 1889.]

480. Before an execution against the person of a judgment debtor can be allowed by the supreme court, the district court, or any judge thereof, under the provisions of § 507, civil code, an affidavit therefor must be made by the judgment creditor, or his attorney. An affidavit by an agent not an attorney is insufficient. (*In re Heath*, 40 K. 333.)

481. Under the provision of the civil code, §§ 505-507, authorizing an execution against the person of a judgment debtor, a district judge at chambers, upon a sufficient affidavit of a judgment creditor or his attorney, with other evidence, has authority to require the judgment debtor to be arrested and committed until the judgment is paid, or he is discharged according to law. (*In re Heath*, 40 K. 333.)

482. In a preliminary examination of a defendant charged with felony, the magistrate discharged the defendant and found that the prosecution was instituted maliciously and without probable cause, and adjudged that the prosecuting witness pay the costs, and stand committed until they were paid. Failing to pay the costs, the prosecuting witness was committed to the county jail. *Held*, In a proceeding in *habeas corpus*, that the imprisonment was illegal. (*In re Heitman*, 41 K. 136.) [March, 1889.]

483. A person found to be insane by the verdict of a jury impaneled in a proceeding had under the act relating to lunatics and habitual drunkards is exempt, under § 35 of the act, from being held to bail, and from imprisonment on a criminal charge, so long as such verdict is in force and operative. (*In re Kidd*, 40 K. 644.)

484. A party to an action can compel a witness to give his deposition in the case prior to the trial, even though such witness resides in the county in which the action is brought; and where a witness, duly subpoenaed to testify in a cause before a

notary public, in giving his deposition, refuses to answer certain questions propounded to him, for no other reason than that he is instructed by counsel not to do so, after having been instructed by the notary to answer them, he may be committed by the notary for contempt for such refusal. (*In re Abeles*, 12 K. 451, cited and followed.) (*In re Merkle*, 40 K. 27.)

485. "The judge of a district court at chambers cannot legally hear and determine a prosecution in the nature of contempt proceeding for an alleged violation of a peremptory writ of mandamus." See state of Kansas on relation of S. S. Ashbaugh, county attorney of Kingman county, Kansas, v. John J. Stevens, county clerk of said county, 40 K. 113. (*In re Price*, 40 K. 156.)

486. Where a defendant has filed an answer, good in form, to which a reply has also been filed, he cannot be compelled, at the instance of the plaintiff, to give an affidavit or deposition before a notary public, to be used on the hearing of a motion to strike from the files the answer, upon the ground that it is false, and therefore a sham. (*In re Bartholomew*, 41 K. 273.)

487. The complainant referred to in § 18, ch. 83, Comp. Laws of 1885, relating to procedure before justices in misdemeanors, is the party who makes to a justice of the peace, on his oath or affirmation, a complaint charging a person with the commission of a misdemeanor. (*In re Winna*, 41 K. 127.) [March, 1889.]

488. Under said § 18 of ch. 83, a justice of the peace has no authority to enter judgment against a witness for the costs that have accrued in the proceedings had upon a complaint charging a person with the commission of a misdemeanor, when such witness has not made, signed or filed with the justice any complaint in the cause. (*In re Winna*, 41 K. 127.) [March, 1889.]

HOMICIDE—MURDER.

489. The authorities of the state of Kansas have jurisdiction to try a white man for the murder of another white man, committed on the reservation of the Kansas tribe of Indians in said state, and no such power resides in the circuit court of the United States for the district of Kansas. (*U. S. v. Ward*, McC. 199.)

490. The right to punish for murder, or any other offense committed within the limits of her territory, must belong to the state of Kansas, unless some rule of law constitutes special cases exceptions to that rule. (*U. S. v. Stahl*, McC. 206.)

491. The *situs* of Fort Harker was not purchased by the United States, and no consent was ever given by the legislature of the state of Kansas to use it as a fort. (*U. S. v. Stahl*, Wool. 192; McC. 206.)

492. The government of the United States, when it admitted Kansas into the union upon the same footing as the original states, retained the legal title to all the lands which she then owned in the state of Kansas, but parted with the sovereignty or jurisdiction for the general purposes of government over it, with certain reservations and exceptions. (*U. S. v. Stahl*, McC. 206.)

493. The right to exercise jurisdiction over the crime of murder having been vested in the state of Kansas by the act admitting her as a state, and she never having parted with that right, it cannot belong to the United States. (*U. S. v. Stahl*, McC. 206.)

494. The courts of the United States have no jurisdiction of the crime of murder committed upon the military reservation of Fort Harker in the state of Kansas. (*U. S. v. Stahl*, McC. 206.)

495. The accused may stand upon the presumption of innocence until every material allegation and every ingredient of the crime are proved. (*Horne v. State*, 1 K. 42.)

496. A few facts, or a multitude of facts proven, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the prisoner committed the crime, but they must all be inconsistent with any other rational conclusion. (*Horne v. State*, 1 K. 42.)

497. The fatal effect of a separate and an erroneous charge to a jury, upon a material point, is not cured by the court having, in other parts of the charge, given the true rule of law as applicable to that point. A charge to a jury, that the defendant and another person "might both be guilty of *this murder*," is a mixed one of law and fact. As a charge of fact, it intimates that *this was murder*, which is a fact or a conclusion from facts, the determining of which is the special and exclusive province of the jury. As a charge of law, it announces that two persons may be guilty as principals in one crime. This is true, and a proper instruction; but mixed with the fact of *this being murder*, it is error, because the jury were not informed that they were the exclusive judges of the facts. The court has a right to present the facts in his charge, but must in that case inform the jury that they are the exclusive judges of all questions of fact. (*Horne v. State*, 1 K. 42.)

498. The service of the notice of appeal on the clerk and on the appellee or his attorney, according to the requirements of the code of criminal procedure, constitutes the appeal, and upon that alone the jurisdiction of the supreme court to review the judgment and decisions of the court below rests. Such notice should appear in the transcript filed. (*Carr v. State*, 1 K. 331.)

499. The supreme court cannot assume the existence of a portion of the record not before it, nor render a judgment which, upon the face of its own record, would appear to be without jurisdiction, although the appellee may appear and argue the merits. (*Carr v. State*, 1 K. 331.)

500. The killing in question in this case, not having been done by poison, nor lying in wait, nor in an attempt to commit

a felony, must have been willful, deliberate and premeditated to be murder in the first degree under § 1 of the act regulating crimes and punishments, and such deliberate and premeditated will or intent to kill must be alleged in the indictment. (*Smith v. State*, 1 K. 365.)

501. A clause in an indictment setting forth, first, a willful, deliberate and premeditated assault; second, a willful, deliberate and premeditated shooting and wounding; third, that the wounding was mortal, and that the wounded man instantly died; and closing as follows: "And the jurors aforesaid, upon their oaths aforesaid, do say, that the said Bailey Smith, him, the said James Duke, in the manner and by the means aforesaid, unlawfully, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did kill and murder," etc., contains a sufficient allegation of the intent, and a motion to arrest the judgment on the grounds that the facts stated in the indictment do not constitute a public offense was properly overruled. (*Smith v. State*, 1 K. 365.)

502. Secs. 87 and 89 of the criminal code divest an indictment of all artificial and technical construction, and give to its language its ordinary meaning. (*Smith v. State*, 1 K. 365.)

503. All laws relating to criminal matters are made by statute applicable to the criminal court of Leavenworth county. (*Smith v. State*, 1 K. 365.)

504. The defendant sustained his application for a change of venue by his affidavit, fully conforming to § 152 of the criminal code, and his application being out of time, he conformed to the requirements of § 159 by swearing that the grounds of his motion had come to his knowledge since the last continuance. *Held*, That though § 152 is, by its terms, permissive, yet that it is in fact like § 159 imperative, and the rights given to the defendant by it absolute; *held*, that upon such a showing it is not discretionary with the court to refuse the change; that the defendant is not required to *prove* to the satisfaction of the court, but only to support his motion by an affidavit, and that there is no provision for receiving counter evidence. The refusal of

the court, on such a showing, to grant the change, was error. (*Smith v. State*, 1 K. 365.)

505. Where a motion to change the venue is made by the defendant below, without serving notice thereof on the district attorney, but where he argued the motion on the merits, not objecting to the want of notice, *held*, that the effect of the motion cannot be avoided by afterwards showing such want of notice. *Held*, That such want of notice is no ground for overruling the motion. (See *Newburg Turnpike Co. v. Millar*, 5 J. C. 113; *City of New York v. Fain*, 3 Hill, N. Y., 612; *Cutler v. Howard*, 9 Wis. 309.) (*Smith v. State*, 1 K. 365.)

506. Where a person summoned as a juror in an action for murder swears, on his *voir dire*, that he has heard a detailed statement of the circumstances of the killing, which he remembered, but that he had not formed nor expressed an opinion, *held*, that the person was not disqualified to sit as a juror. (*Roy v. State*, 2 K. 405.)

507. *Held*, That a charge of murder in an indictment necessarily includes the crime of manslaughter in the third degree, as defined in §13 of the chapter on crimes and punishments; and *held*, that under §108 of the criminal code a person so charged might be found guilty of manslaughter; *held*, that the indictment gave notice to the accused of the charge of the crime he was found guilty of. The substantive offense is the wrongful killing of a human being, and the attendant facts determine the grade of the crime. (*Roy v. State*, 2 K. 405.)

508. In a criminal action for murder, an exception to a ruling of the court below rejecting evidence offered by defendant of the comparative strength of the deceased and the defendant, becomes unavailable where it is admitted by the prosecution in open court that the deceased was a much stronger man than the defendant. *Semble*, The facts in detail, of what occurred at the time of the homicide—as the grapple, scuffle, etc.—were better evidence of comparative strength, than the opinion of a witness. (*Wise v. State*, 2 K. 419.)

509. The character and habits of the deceased (as that he

was well known by defendant and others to be quarrelsome and savage) are inadmissible as evidence, unless, at least, the circumstances of the case raise a doubt as to whether the defendant acted in self defense, and the record must show that the defendant was justified in believing himself in danger. *Held*, That the circumstances detailed, covering the *res gestæ*, are sufficient to show the character of deceased, so far as it was proper to show it; and from these circumstances must the provocation, under which defendant acted, be judged in this case. (*Wise v. State*, 2 K. 419.)

510. Where the record shows that the parties were eight or nine paces apart at the time of the fatal shooting, defendant with a loaded double-barrel shot gun, and deceased with a knife, and that deceased had stopped before defendant shot him, there is hardly sufficient cause shown to have justified defendant in considering himself in danger. (*Wise v. State*, 2 K. 419.)

511. Where the court refused to charge "that the defendant is entitled to the benefit of every reasonable doubt upon every material fact involved in the case," but charged that "the defendant is entitled to the benefit of every reasonable doubt of his guilt, remaining in the minds of the jury, after canvassing the whole of the testimony in the case," *held*, that the charge given was the law applicable to the case, and that an exception to the refusal of the court to charge as asked was not well taken. (*Wise v. State*, 2 K. 419.)

512. An indictment commencing, "State of Kansas, Chase county, ss.: In the district court of the fifth judicial district sitting in Chase county, April Term, A. D. 1863. The jurors of the grand jury of the state of Kansas, duly drawn, impaneled, charged and sworn to inquire of offenses committed within the body of the county of Chase, and within the county of Marion attached to said county of Chase, for judicial purposes," etc., *held*, to sufficiently show that it was found by a grand jury of the county of Chase, under § 95 of the criminal code. (*Wise v. State*, 2 K. 419.)

513. Felonies are offenses against, prosecuted and punished

by, and in the name of the state, by a grand jury, organized in each county. pursuant to state law, to inquire in its behalf as to infractions of its laws in each county. (*Wise v. State*, 2 K. 419.)

514. Under subd. 5, § 95, criminal code, where, in the indictment, a word, necessary in one description of the wounds, is omitted, but where the indictment still contains a certain and explicit description of the wound that caused the death, *held*, sufficient, and that the defective description might be treated as surplusage under subd. 6, § 96, or disregarded under subd. 7 of that section of the criminal code. (*Wise v. State*, 2 K. 419.)

515. An indictment presented December 5th, 1865, signed by the prosecuting attorney as "district attorney," was not for that reason void under the act of February 12th, 1864, creating the office of county attorney, and repealing the act creating district attorney; and *held*, that the proviso in the 16th section of the latter act continued in office the district attorneys elected in 1863 until January, 1866. (*Craft v. State*, 3 K. 450.)

516. The showing that the principal witness against the defendant in an action for murder had been indicted for the same offense, and declared on the witness stand that she was a common prostitute, and was in company with defendant during the night of the homicide, and that the prosecuting attorney had agreed with her not to prosecute the indictment against her if she told the truth: *Held*, That nothing but a plea of guilty or the verdict of a jury would show her to have been an accomplice; but *held*, that the indictment against her was admissible in evidence as affecting the weight of her testimony, and that the court erred in rejecting it. (*Craft v. State*, 3 K. 450.)

517. Had it been shown that she was an accomplice, it would not have been necessary to a legal conviction that her evidence be corroborated in every material matter. (*Craft v. State*, 3 K. 450.)

518. Had the jury believed her a common prostitute, they were not bound as a matter of law to reject her testimony. (*Craft v. State*, 3 K. 450.)

519. Murder at common law is "where a person of sound memory and discretion unlawfully kills any reasonable creature in being and in the peace of the state, with malice prepense or aforethought, (*i. e.*, with unlawful intent, before the killing, to take life,) either express or implied." Deliberation and premeditation in any other sense were not necessary ingredients. (*Craft v. State*, 3 K. 450.)

520. In §§ 1 and 2, crimes act, (Comp. Laws, p. 287,) the legislature did not define the word "murder," but used it in this technical common-law sense, dividing it into degrees—that which is deliberately and premeditatedly done is murder in the *first*, and all other murders are in the *second* degree. To determine the degree, it is only necessary to determine whether it was done deliberately and premeditatedly. "Deliberately," here used, means that the manner of the homicide was determined upon after examination and reflection; that the consequences, chances and means were weighed, carefully considered and estimated. "Premeditatedly" literally means planned, contrived or schemed beforehand. (*Craft v. State*, 3 K. 450.)

521. The instruction given to the jury, that "it is also necessary that the defendant intended to kill the deceased at the time of the homicide, (but if he formed his purpose even while striking the deceased, and after having formed the purpose, continued to strike Gallagher, and such striking resulted in death, then that would be sufficient evidence of intention.) The intention of defendant is to be arrived at by considering how he committed the act charged, with what kind of weapon, under what circumstances, and generally by considering all the facts and circumstances attending the act," taken with other instructions given, do not contravene the law; but *semble*, the correct practice is for the court to treat the separate propositions requested by counsel as suggestions, and to embody what is correct and applicable in a succinct charge, without repetition. (*Craft v. State*, 3 K. 450.)

522. *Held*, That the court in charging a jury "must state to them all matters of law which are necessary for their informa-

tion in giving their verdict," (Comp. Laws, Crim. Code, § 215, p. 268;) that as under a charge of murder in the first degree, the defendant may be convicted of any offense necessarily included therein, viz.: murder in the second, and manslaughter in the different degrees, it was the duty of the court to explain all to the jury. (*Craft v. State*, 3 K. 450.)

523. When there is testimony upon a question of fact material to the issue, the jury are the exclusive judges of that question, and must determine what the testimony proves, but the law requires the court, after the jury have made their findings, to determine whether there is *any* evidence of a particular material fact. (*Craft v. State*, 3 K. 450.)

524. The law does not presume that a homicide was deliberate and premeditated and done with malice, but these facts must be proved by evidence or reasonably inferred from established circumstances, (which may differ in different cases,) and must be found by the jury, that their verdict of murder in the first degree may be sustained. (*Craft v. State*, 3 K. 450.)

525. The jury are the judges of the facts and of the inferences, subject only to the limitation that they must be *reasonable* inferences. There is no distinction in principle between express and implied malice. (*Craft v. State*, 3 K. 450.)

526. The record showing that the defendant and the deceased, personal acquaintances and friends, met accidentally, exchanged a few words, when the homicide occurred, and nothing appearing as to former grudges, threats or planning, it does not justify a finding of premeditation and deliberation, though the manner and immediate circumstances of the killing might justify a finding of malice. (*Craft v. State*, 3 K. 451.)

527. A refusal of the court below to charge the jury, under the circumstances of the case, in an action for murder, that "if the jury believe from all the evidence that the witness Molly Brown" (principal witness against defendant, who stood indicted for the same offense) "has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony," *held*, error—that language embodying a sound prin-

ciple of law, (25 Mo. 554,) and especially as the record shows that the defendant might have been prejudiced by the charge, and, *semble*, that it would not be sufficient to charge that the jury are *authorized* to disregard such evidence. (*Campbell v. State*, 3 K. 488.)

528. The presumption that a witness will declare the truth ceases as soon it manifestly appears that he is capable of perjury. (15 Ohio St. 55-6; 7 Wheat. 283.) (*Campbell v. State*, 3 K. 488.)

529. Where one member of the "United Tribes" (Kaskaskia, Peorias, Piankeshaw and Wea Indians) killed another member, the record failing to show that the homicide was committed within the limits of any Indian reserve, *held*, that such Indian cannot claim more than a foreigner whose nation has treaty relations with us, that there are no general exceptions of foreigners from the duty of observing our laws while here; our law binds and protects alike, all persons, native or foreign, found within our territory, to which rule Indians are subject; and, *held*, that the court below did not err in so charging the jury. (*Hunt v. State*, 4 K. 61.)

530. The law allows no appeal in a criminal case until its final determination. (*Cummings v. State*, 4 K. 225.)

531. An accomplice used by the state, as a witness, is not entitled to his discharge as a matter of right; he must abide by the discretion of the court and the prosecuting attorney. (*Cummings v. State*, 4 K. 225.)

532. When an affidavit for a continuance on the ground of an absent witness, who is beyond the limits of the state, is filed by the defendant in a criminal case, and the prosecutor for the state consents that the same shall be read in evidence as the statement and testimony of such absent witness, it is proper for the district court having jurisdiction under the provisions of the statute, to refuse the application and direct the trial to proceed. (*State v. Dickson*, 6 K. 209.)

533. It is within the discretion of the court having jurisdiction to excuse persons summoned upon juries from serving in

any particular case, upon application being made for such excuse; and unless it is shown that such discretion has been abused, a reviewing court will not interfere. (*State v. Dickson*, 6 K. 209.)

534. It is not error to permit a witness on the part of the state in a criminal prosecution, and whose name has become known to the prosecutor after the commencement of the trial, to testify, even though the name of such witness has not been indorsed upon the information at all. (*State v. Dickson*, 6 K. 209.)

535. Misconduct of a juror on the trial of a criminal cause, which does not prejudice the defendant, will not of itself justify the supreme court in reversing a judgment of conviction. (*State v. Dickson*, 6 K. 209.)

536. Instructions are to be considered and construed together, as a whole; and if not erroneous when so construed, no one of them will be held to be erroneous. And when the instructions complained of relate to a degree of crime inferior to the principal offense charged in the information, and inferior to that of which the defendant is convicted, they will be deemed not to have prejudiced the defendant, whether erroneous or not. (*State v. Dickson*, 6 K. 209.)

537. The inattention, or misapprehension of a portion of the jury, with respect to the charge and instructions of the court, is not ground for a new trial; and the affidavit of a juror that he did not hear certain instructions which were given by the court, will not be received in support of a motion for a new trial. (*State v. Dickson*, 6 K. 209.)

538. Statements or admissions made by a party arrested for an alleged crime, and in custody of a proper officer, though without process, which statements are not brought out by threats, promises, intimidation, or artifice, or by any inducement whatever, may be given in evidence against him on his trial. (*State v. Reddick*, 7 K. 143.)

539. Where a witness testifies to certain events in the history of the accused, the object of which is to show a tendency to bring on a diseased condition of the brain, the witness may on

cross examination be asked to state what in his judgment was the effect upon the mind of the defendant of the injuries described. The question is proper, not only to test the capacity of the witness, but as asking further about facts elicited from witness on his examination in chief. On cross examination great latitude is necessarily indulged, that the intelligence of the witness, his powers of discernment and capacity to form a correct judgment may be submitted to the jury, that they may have an opportunity of determining the value of his testimony. (*State v. Reddick*, 7 K. 143.)

540. On questions of science, skill, or trade, persons of skill, sometimes called *experts*, are permitted to give their opinions in evidence; and when the question before the jury is, whether a particular act of the prisoner was an act of *insanity*, a physician and surgeon of many years' practice and experience, who has studied psychological medicine, and has had experience in the incipency of mental diseases, may give his opinion whether the manner in which the act was done, the circumstances of the absence or presence of apparent motive, and the whole details of the transaction would be considered by scientific men in determining the question of sanity or insanity, although the witness had not shown that he had made diseases of the mind a special study. (*State v. Reddick*, 7 K. 143.)

541. Where habitual unsoundness of mind is once shown to exist, it is presumed to continue to exist until the presumption is rebutted by competent proof, beyond a reasonable doubt. (*State v. Reddick*, 7 K. 143.)

542. When liberal and favorable instructions upon a given question are asked by a defendant, and are given to the jury as asked, he will not be heard to complain of such instructions; and if the state claims no error by reason thereof, the court will not determine whether such instructions are correct or not. (*State v. Reddick*, 7 K. 143.)

543. An information which in one count charges murder in the first degree, charges all the different degrees of felonious homicide, including murder in the first and second degrees, and

manslaughter in its four different degrees. A verdict that finds the prisoner guilty as charged, without specifying of what degree of the offense he is found guilty, is not such a verdict as will authorize a judgment for murder in the first degree; nor is the court authorized to look outside the verdict to ascertain that the jury intended, by such verdict, a verdict of murder in the first degree. (*State v. Reddick*, 7 K. 143.)

544. An information is good that states the nature of the offense charged, with accuracy, precision and certainty, so that the accused cannot be misled as to the charge he has to answer, nor the court in doubt as to the judgment to be pronounced on a verdict. (*State v. McCord*, 8 K. 232.)

545. Under the statute of 1871, the wife of the accused is a competent witness for the state in the trial of her husband for a criminal offense. The court cannot require her to testify, but may permit her to do so voluntarily. (*State v. McCord*, 8 K. 232.)

546. In this state a new trial granted on the motion of the defendant in a criminal case, places the party accused in the same position as if no trial had been had. (*State v. McCord*, 8 K. 232.)

547. Upon an information charging murder in the first degree, the jury may find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter in the first, second, third or fourth degrees; and if the jury do not specify in their verdict the degree of offense of which they find the defendant guilty, their verdict is defective, and the court should on motion of the defendant grant a new trial. (*State v. Huber*, 8 K. 447.)

548. And in such a case, although the defendant may not except to the ruling of the court overruling his motion for a new trial, nor object to the sufficiency of the verdict in any other manner except by moving for a new trial, still he is not deprived of his right to appeal to the supreme court, and then raise the question of the sufficiency of the verdict. (*State v. Huber*, 8 K. 447.)

549. Sec. 236 of the criminal code provides that the court "must charge the jury in writing;" and it is error to omit to do so in any criminal case. (*State v. Huber*, 8 K. 447.)

550. Judgment must be regularly pronounced and formally entered in criminal cases to authorize the execution of the sentence. It is not sufficient that the process commanding the officer to carry the sentence into execution recites that the "defendant had been sentenced by the court." (*State v. Huber*, 8 K. 448.)

551. On a motion for a change of venue the appellant read a number of affidavits tending to show by general averments and not by specific statements of facts, that such prejudice existed against him in the county that he could not have a fair trial. For the state a number of affidavits were read tending to show that a fair trial could be had, and that in the different portions of the county where the affiants resided, no prejudice against the appellant existed. The court refused to grant the change of venue. *Held*, No error. (*State v. Horne*, 9 K. 119.)

552. On a trial for murder, the state may introduce testimony showing that the deceased was intoxicated at the time of the homicide. (*State v. Horne*, 9 K. 119.)

553. Where a defendant in a criminal cause has testified in his own behalf and left the stand, it is not error for the court to allow him to be recalled by the state and cross examined for the purpose of laying the foundation for impeaching his testimony, if the cross examination related to the testimony he had given in his own behalf. (*State v. Horne*, 9 K. 119.)

554. Where the accused is on trial for an alleged felonious homicide, the state may show that the accused was looking and inquiring for deceased a short time before the killing, and what the accused said at such time in regard to the deceased. (*State v. Horne*, 9 K. 119.)

555. On a trial for murder, if the defendant relies on a supposed necessity for the killing, as a justification or excuse, the rule to be applied is, that the accused must have believed that he was in immediate and actual danger of his life from

the deceased, and this belief must rest on reasonable grounds, and the party from whom the danger is apprehended must be making some attempt to execute his design, or at least be in an apparent situation to do so, and thereby induce a reasonable belief that he intends to do so immediately. (*State v. Horne*, 9 K. 119.)

556. Affidavits of jurors will not be read to impeach their verdict on any ground essentially necessary to consider in making up the verdict. (*State v. Horne*, 9 K. 119.)

557. Impressions not amounting to opinions, received from newspaper articles or rumor, do not disqualify a juror, and are not cause for challenge. VALENTINE, J., *dissenting*. (*State v. Medlicott*, 9 K. 257.)

558. It is not error to permit a witness on the part of the state, in a criminal prosecution, whose name has become known to the prosecutor after the commencement of the trial, to testify, even though the name of such witness has not been indorsed upon the information. (*State v. Dickson*, 6 K. 209; *State v. Medlicott*, 9 K. 257.)

559. Statements not under oath can only be admitted in evidence as dying declarations when they are made *in extremis*, and where the death of the person who made the declaration is the subject of the charge, and where the circumstances of the death are the subject of the declaration, and the person making them is in the full belief that he is about to die; and this condition of the mind must be made clearly to appear. (*State v. Medlicott*, 9 K. 257.)

560. A witness cannot be permitted to testify as an expert, as to his opinion founded on certain facts and upon a part of the medical testimony in the case, it not appearing what part of the testimony he has heard. Such testimony is not proper even on cross examination, as a test of the witness' capacity. (*State v. Medlicott*, 9 K. 257.)

561. Instructions which are not necessary, and which are not calculated to assist the jury in deciding on the issues submitted to them, ought not to be given, although they are correct state-

ments of the law upon the subject or point to which they relate. (*State v. Medlicott*, 9 K. 257.)

562. Impressions not amounting to opinions, received from newspaper articles or rumor, do not disqualify a juror, and are not cause for challenge. (*State v. Medlicott*, 9 K. 257, cited and followed.) (*State v. Crawford*, 11 K. 32.)

563. In a criminal action, where the defense of insanity is set up, it does not devolve upon the defendant to prove that he is insane, by a preponderance of the evidence; but if, upon the whole of the evidence introduced on the trial, together with all the legal presumptions applicable to the case, under the evidence, there should be a reasonable doubt as to whether the defendant is sane or insane, he must be acquitted. (*State v. Crawford*, 11 K. 32.)

564. When a statute is repealed, and the repealing statute is silent as to whether the rights and remedies which have accrued under the repealed statute shall be abrogated or not, § 1 of the "act concerning the construction of statutes (Gen. Stat. 998) will have the force and effect to save and preserve all accrued rights and remedies, whether they belong to the state or to individuals, and in criminal as well as in civil cases. (*State v. Boyle*, 10 K. 113; *State v. Crawford*, 11 K. 32.)

565. Where a criminal prosecution for murder in the first degree has been tried by a jury, and the jury has found the defendant guilty of murder in the first degree, and the court trying the cause has sustained the verdict, and where the evidence introduced on the trial is conflicting and contradictory, but where the evidence tending to show the defendant's guilt is sufficient if it were not contradicted by other evidence, and if it were allowed to have its full force and effect to prove beyond all reasonable doubt every material fact necessary to be proved in the case, and every essential element of murder in the first degree, the verdict will not be disturbed by the supreme court merely upon the ground that it is not sustained by sufficient evidence. (*State v. Morrow*, 13 K. 119.)

566. On a trial for murder, it is error to permit the state in

the first instance, and as a part of its case, to offer testimony showing the character or reputation of the deceased as a quiet and peaceable man. (*State v. Potter*, 13 K. 414.)

567. Where the deceased and defendant had two affrays in the same afternoon, the interval between which was about an hour, and during such interval were out of the sight and hearing of each other, though driving along the same road on the way to their respective homes, *held*, that the second affray was not a continuation of the first to such an extent as to make competent evidence of the statements of the deceased or his comrades, in such interval, and in the absence of the defendant, as to what had happened, or what he thought the intentions of the defendant were. (*State v. Potter*, 13 K. 414.)

568. In order to establish that a homicide was committed in self defense, it is not essential that the defendant show that deceased *actually* had a deadly weapon; it is sufficient in that respect if he show that the conduct of deceased was such as to induce a reasonable belief that he had one. (*State v. Potter*, 13 K. 414.)

569. An information for murder in the second degree against three parties, which charges that the three, in pursuit of a common purpose, unlawfully, purposely, and maliciously made the assault, that each was armed with a separate weapon, describing it, that one, with his weapon, in a cruel and unusual manner wickedly, purposely, and maliciously inflicted several mortal wounds, describing them, of which the deceased died, that the others, at the same time and place, with their weapons wickedly, purposely, and maliciously encouraged, abetted, assisted and protected him in said acts, and closes with the charge that the three, naming them, "in the manner and by the means aforesaid, unlawfully, feloniously, willfully, wickedly, purposely, and maliciously, and with malice aforethought, did kill and murder," charges upon all the intent to take life sufficiently for the crime of murder in the second degree. (*State v. Potter*, 15 K. 302.)

570. If the court, in its instructions gives in general terms the elements of the crime charged, and it is not asked by de-

defendant to enlarge upon and explain further any particular elements or features thereof, no error has been committed in failing to give fuller and more explicit instructions which will justify a reversal. Especially is this true, when the testimony is not preserved, and there is nothing in the record from which it can be inferred that any particular matter called for especial notice and explanation. (*State v. Potter*, 15 K. 302.)

571. When the instructions complained of relate to a degree of crime inferior to the principal offense charged in the information, and inferior to that of which the defendant is convicted, they will be deemed not to have prejudiced the defendant, whether erroneous or not. (*State v. Dickson*, 6 K. 209; *State v. Potter*, 15 K. 302.)

572. Where the jury returned a verdict finding the defendant guilty, and adding a recommendation that he receive the lowest punishment allowed by law, and the court declined to receive it, and handed them a form of verdict answering to the same degree of the crime as the prior verdict, but without the recommendation, which was duly signed and returned, *held*, that no error had been committed affecting the substantial rights of the defendant. (*State v. Potter*, 15 K. 302.)

573. The statute requiring a written charge to the jury in criminal offenses is imperative, and the failure to comply with it is an error compelling a reversal. (*State v. Potter*, 15 K. 302.)

574. Where the bill of exceptions simply states that a part of the charge, or some of the instructions, were given orally, without stating the language used, the statute will be held to apply, and the judgment be reversed. (*State v. Potter*, 15 K. 302.)

575. It is immaterial whether the oral portion of the charge is given before the jury retire to consider of their verdict, or after they (having once retired) return to ask further instructions; and whether it is a separate instruction, or a mere explanation of a written instruction, it is an error in either case. (*State v. Potter*, 15 K. 302.)

576. The mere fact that an oral communication has passed

from the court to the jury is not of itself proof that the statute has been disregarded. But the court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury, or counsel, or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence. (*State v. Potter*, 15 K. 302.)

577. Where a juror propounds a question to the court, it may make a direct answer, without reducing the same to writing, provided in so doing it does not make an independent statement of a rule of law. In other words, where the question of the juror is the full statement of the rule, and the answer is no more than an affirmation or denial, such affirmation or denial need not be reduced to writing before it is given. (*State v. Potter*, 15 K. 302.)

578. In a criminal prosecution for murder, while the jury were being impaneled, one of the jurors, upon an examination as to his competency to serve as a juror, stated "that he had formed the opinion that Phillips, the deceased, was killed, and that Brown, the defendant, killed him," and nothing further was shown with reference to the competency of said juror; and the defendant then challenged said juror for cause, and the court overruled the challenge. *Held*, That the court erred. (*State v. Brown*, 15 K. 400.)

579. And the defendant having exhausted all his peremptory challenges in said case, the error will be considered material, although said juror was afterward discharged by the court on one of the defendant's peremptory challenges. (*State v. Brown*, 15 K. 400.)

580. A motion for a change of venue was supported by the affidavits of the accused and two others, showing facts that made out a *prima facie* cause for a change of venue; but the state filed over ninety affidavits controverting the conclusions

of those of the accused. The court did not err in refusing a change of venue. (*State v. Bohan*, 15 K. 407.)

581. So-called dying declarations are only admissible where the death of the person who made the declaration is the subject of the charge and the investigation. (*State v. Bohan*, 15 K. 407.)

582. Where a change of venue is granted in a criminal case, and the proceedings are so irregular as to be wholly void, then the court to which the case is taken does not acquire jurisdiction of the case, and the question of jurisdiction may then be raised at any time in that court, or the defendant may even wait, and, if convicted and sentenced, raise the question for the first time in the supreme court on appeal. (*State v. Potter*, 16 K. 80.)

583. But where the proceedings of the court granting the change of venue are not so irregular as to be wholly void, but are merely irregular or voidable, then the question as to the regularity of such proceedings must be raised at the earliest convenient opportunity. (*State v. Potter*, 16 K. 80.)

584. Therefore, where a change of venue is erroneously granted on the application of the defendant in a criminal case, and the case is taken to another court, and there regularly called for trial, and the defendant, without questioning the jurisdiction of the court, moves for a continuance of his case, and then, after his motion is overruled, and a jury impaneled, challenges the jury because they are not from the county or district where the offense is alleged to have been committed, and then, after his challenge is overruled, and evidence introduced, objects for the first time to the jurisdiction of the court, but does not even then object for any irregularity in taking the change of venue, and then, after he has been tried and convicted, and a motion for a new trial overruled, raises the question for the first time, and on a motion in arrest of judgment, that the order granting the change of venue was irregular, and erroneously granted: *Held*, That the objection to the change of venue is made too

late, and the order changing the venue will be considered valid. (*State v. Potter*, 16 K. 80.)

585. A change of venue in a criminal action from one judicial district to another, granted on the application of the defendant, is not void, although the application may not be in writing, and although sufficient facts therefor are not shown and do not exist. Such a change of venue is irregular and erroneous, but the error is against the state, and not against the defendant. (*State v. Potter*, 16 K. 80.)

586. The constitutional right of a defendant in a criminal action, to be tried "by an impartial jury of the county or district in which the offense is alleged to have been committed," (Const., Bill of Rights, § 10,) is a mere personal privilege which the defendant may waive by change of venue or insist upon at his option. It is not a right conferred upon him from considerations of public policy; and public interests would not be likely to suffer by a waiver thereof. (*State v. Potter*, 16 K. 80.)

587. If it were necessary that the defendant in a criminal case should be personally present in court when a change of venue is granted, (which is questioned,) still, where the record does not show that he was absent, and where the order granting the change would, if liberally interpreted, lead to the conclusion that he was present, the supreme court will, in favor of the regularity and validity of the proceedings of the court below, presume that the defendant was personally present. (*State v. Potter*, 16 K. 80.)

588. Where the clerk, through a clerical mistake in entitling the order changing the venue, writes the word "manslaughter" where the words "murder in the second degree" should have been written—the rest of the order being correct, *held*, that the mistake will not invalidate the order. (*State v. Potter*, 16 K. 80.)

589. Where a court granting a change of venue in a criminal case fails to make any order for the removal of the defendant to the jail of the county to which the cause is removed, (Orim. Code, § 186,) and no such order is asked for, and no

inconvenience is shown to have resulted from the failure to make such order, and the defendant is personally present at the trial of the cause, where he is tried, convicted, and sentenced: the judgment of the district court will not be reversed merely because of such failure to make such order. (*State v. Potter*, 16 K. 80.)

590. When the defendant is charged with the offense of murder in the second degree, and the evidence shows that the defendant killed the deceased with a piece of a fence rail, it is not error for the state to show among other things that the deceased was a man about sixty years of age and about five feet and six or seven inches high. (*State v. Potter*, 16 K. 80.)

591. It is error for a court to instruct the jury that, "if any witness has willfully testified falsely as to any material fact in the case, then the jury *should* disregard all the testimony of such witness." (*Shellabarger v. Nafus*, 15 K. 547.) Even where a witness has testified willfully, corruptly and falsely to a material fact in a case, still the question as to whether the jury should disregard the whole of his testimony should be left entirely to the jury themselves. But still, where such erroneous instruction was given, and not excepted to, the supreme court will not consider the error. (*State v. Potter*, 16 K. 80.)

592. Where evidence was introduced on the trial of Isaac Potter for murder in the second degree, showing that George Potter, at Brack's corner, in the presence and hearing of the defendant said, "that he wanted to kill the old man, (meaning the deceased); that was his intention;" and shortly afterwards George and Isaac Potter followed the deceased, each armed with a piece of a fence rail, and Isaac Potter did then and there "kill the old man," *held*, that it was not error for the court to refuse to instruct the jury "that unless they find from the evidence that in the altercation at Brack's corner George Potter was aided, counseled or abetted by Isaac Potter in what he did, they cannot take said altercation at Brack's corner, or any acts, words or conduct of George Potter, into consideration in deter-

mining the guilt or innocence of defendant." (*State v. Potter*, 16 K. 80.)

593. Where there is sufficient evidence introduced to prove that the defendant, who is charged with murder in the second degree, is guilty as charged, although some of this evidence is contradicted by other evidence, it is not error for the court to refuse to instruct the jury "that under the evidence in this case they cannot convict the defendant of murder in the second degree." It is the province of the jury to weigh the contradictory and conflicting evidence. (*State v. Potter*, 16 K. 80.)

594. Where a jury, in a case of murder in the second degree, return a verdict as follows: "We, the jury, find the defendant guilty as charged," it is not error for the court, after being informed by the jury that they intended to find the defendant guilty of murder in the second degree, to allow the verdict, with the consent of the jury, to be amended so as to read as follows: "We, the jury, find the defendant guilty of murder in the second degree, as charged in the information." (*State v. Potter*, 16 K. 80.)

595. Under an information charging murder in the second degree, this verdict was returned: "We, the jury, find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree. A. B., Foreman." *Held*, That all the parts of the verdict should be considered in determining its effect, and that, so considered, it was evident that the jury only intended to acquit of the major crime in terms charged, to wit, that of murder in the second degree, and did not intend to acquit of the lesser offenses, the different degrees of manslaughter included therein. (*State v. Bowen*, 16 K. 475.)

596. The court takes judicial notice of all prior proceedings in a case, and it is unnecessary to offer evidence of a former trial and the verdict returned on such trial, on the hearing of a plea in bar of "once in jeopardy by such trial and verdict." (*State v. Bowen*, 16 K. 475.)

597. Where the question is purely one of law, it is, although

arising in a criminal case, one exclusively for the court. (*State v. Bowen*, 16 K. 475.)

598. An information for murder is sufficient which charges the giving of the fatal blow in the county in which the prosecution is had, and the fact of ensuing death, although it failed to allege specifically in what county or state the death took place. (*State v. Bowen*, 16 K. 475.)

599. A judgment will not be reversed for immaterial error—not even in a criminal case; nor where the defendant is under sentence for murder in the first degree. (*State v. Winner*, 17 K. 298.)

600. The acts and declarations of one co-conspirator in furtherance of the principal object and design of the conspiracy, may be shown in evidence against each of the conspirators. (*State v. Winner*, 17 K. 298.)

601. Where a party has treated certain acts and declarations, purporting to be those of a particular third person, as though the same were in fact the acts and declarations of such third person, and where such acts and declarations would be competent evidence provided they were in fact the acts and declarations of such third person, the same may be introduced in evidence against said party, and be treated as the acts and declarations of such third person, unless other evidence is introduced showing the contrary. (*State v. Winner*, 17 K. 298.)

602. Ordinarily when the acts and declarations of one co-conspirator are offered in evidence as against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause; but this cannot be always required. It cannot well be required where the proof of the conspiracy depends upon a vast amount of circumstantial evidence—a vast number of isolated and independent facts. And in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial taken together shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the in-

roduction of such acts and declarations. (*State v. Winner*, 17 K. 298.)

603. Where a person seems to be preparing to leave a certain place, and does in fact leave, but before leaving he bids a friend "good-bye," and says he is going to a certain other place, these acts and declarations may be given in evidence along with other evidence as *tending* to show that such person did in fact go to said certain other place, although the party against whom they are introduced was not present at the time the acts were performed, or the declarations made. (*State v. Winner*, 17 K. 298.)

604. In a criminal prosecution, and even in murder in the first degree, the *corpus delicti* may be proved by circumstantial evidence. (*State v. Winner*, 17 K. 298.)

605. In a criminal prosecution for murder in the first degree, where it is claimed that deceased came to his death by poison, and that a chemical analysis of his stomach subsequently made tends to show the same, *held*, that where sufficient evidence is introduced on the trial to prove beyond a reasonable doubt that the stomach analyzed was the stomach of the deceased, and that it had not been improperly tampered with, the evidence concerning the analysis may itself be considered by the jury. It is not necessary in such a case that the stomach should be kept continuously under lock and key or continuously sealed up. The court itself should first pass upon the preliminary proof, and if the court should hold the same to be sufficient, then the question of its sufficiency should also be passed upon by the jury, under proper instructions from the court. (*State v. Cook*, 17 K. 392.)

606. A person who is a chemist and toxicologist may testify as an expert concerning the effect of a certain poison upon the human system, although he may not be a physician or surgeon. (*State v. Cook*, 17 K. 392.)

607. Where one commences an altercation with another, and strikes his adversary with his hand, with no purpose or design to kill or cause great bodily injury to him, and his adversary

repels such assault with a deadly weapon; and after the assailed has shot and wounded the assailant and has retired behind a wall, and the assailant ceases to follow, but has neither retreated or attempted any abandonment of the conflict: *Held*, That the assailant is not justified in defending his own life to the taking the life of the other, even if the assailed attempts at the time to shoot the assailant. (*State v. Rogers*, 18 K. 78.)

608. Neither the certificate of the clerk of a district court, nor the agreed statement of counsel, as to what occurred at a trial, can be made to supply the place of a bill of exceptions taken in accordance with the statute; and when matter is sought to be brought into the record by such means, it will be disregarded by the supreme court. (*State v. Bohan*, 19 K. 28.)

609. Where a criminal case was tried at the February term of the district court, and the regular term next after that of the trial commenced on the 29th of May following, and a bill of exceptions of the proceedings of the trial was not presented or allowed, or signed, or filed, until June 5th, and during the said May term, such bill is unauthorized by law, and no part of the record; and *held*, that a waiver by counsel of the time such bill of exceptions was taken and the manner it was made will not cure the fatal defect as to said exceptions; and *held also*, that an order of said district court of the said May term to have the said bill of exceptions entered as having been presented and allowed as of a previous term of the court, is a nullity. The court has no power, by this mode, of extending the time for the making and signing and filing a bill of exceptions beyond the term. (*State v. Bohan*, 19 K. 28.)

610. Where the February term of the district court was continued to the 24th of May next thereafter, and the court did not convene on the said 24th pursuant to adjournment, the court is legally open until it adjourns *sine die*, or expires by law. (*State v. Bohan*, 19 K. 28.)

611. Neither unfavorable comments as to the innocence of a defendant in a criminal case after a verdict of guilty by a jury, made by a trial judge upon the evidence introduced in the case

when passing sentence upon such defendant, nor adverse rulings, nor errors of judgment of themselves amount to prejudice on the part of a judge so as to compel a removal of the case (upon a new trial granted by the supreme court) to the district court of some county in a different judicial district. (*State v. Bohan*, 19 K. 28.)

612. The mere fact that a deputy sheriff was present at the county clerk's office to attend and witness the drawing of a jury, and after such drawing signed the certificate of the drawing with the county clerk and the two justices of the peace of the county, who also attended such drawing in accordance with the act for the selection of jurors, where the names of all the jurors were drawn from the jury box by such county clerk in the presence of all of such parties, furnishes no cause to discharge or set aside the jurors so drawn. (*State v. Bohan*, 19 K. 28.)

613. Upon the trial of a defendant charged with murder, where the defense is made solely on the ground that the homicide was justifiable, as having been committed in self defense, *held*, that the instructions as to the defense are not erroneous when it clearly appears therefrom that the jury were directed that all the law demands is, that there shall be reasonable apprehensions of imminent danger, and of the reasonableness of this apprehension the jury are to be the judges, but the threats and circumstances upon which this apprehension rests must not only tend to lead to the belief of such danger, but they must force the belief upon the mind, and then the belief must be reasonable, and such as reasonable men act on. (*State v. Bohan*, 19 K. 28.)

614. In the absence of any notice of appeal, required by § 285, Gen. Stat. 866, the supreme court has no jurisdiction to review the rulings and judgment of a district court in a criminal case. (*State v. Ashmore*, 19 K. 544.)

615. Where a criminal case is taken on a change of venue from one county to another, it is not necessary that the original information, or any other original paper, should be transferred

to such other county; but it is the duty of the clerk of the court in which the cause is pending to make out a full transcript of the record and proceedings in the cause, and to transmit the same, duly certified under the seal of the court, to the clerk of the court to which the removal is ordered, and the defendant may then be tried upon such duly certified transcript. (*State v. Riddle*, 20 K. 711.)

616. Where the transcript of the record and proceedings in a criminal case appear to have been duly certified under the seal of the court, and the court below held that it was so certified, *held*, that such court did not commit error in so holding, although an affidavit may have been presented to the court below showing that the affiant *believed* that the certificate, with the seal affixed was not properly made out and attached to the transcript. (*State v. Riddle*, 20 K. 711.)

617. As a rule, in criminal cases for murder; evidence showing that the deceased was a "quarrelsome, turbulent and violent man" should be excluded; and the facts of this case do not present one of the exceptions. (*State v. Riddle*, 20 K. 711.)

618. The court below did not err in this case in limiting the argument of counsel to the jury to four and a half hours on each side. (*State v. Riddle*, 20 K. 711.)

619. In an indictment for murder, where the indictment does not charge that the killing was done by means of poison, or by lying in wait, or in the perpetration or attempt to perpetrate any felony, the indictment must charge that the killing was done deliberately and premeditatedly, in order to make the same a good indictment for murder in the first degree. (*State v. Brown*, 21 K. 38.)

620. Therefore, where an indictment for murder charged substantially that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased, by shooting him with a pistol loaded with gunpowder and leaden balls, and thereby inflicted a mortal wound, from which mortal wound the deceased died, but did not anywhere charge that the defendant committed the assault and battery, or did

the shooting or killing, with the deliberate or premeditated intention of killing the deceased, *held*, that the indictment did not charge murder in the first degree. (*State v. Brown*, 21 K. 38.)

621. Where an indictment for murder charges that the killing was done by John Taylor, Wm. Brown, and Thomas Craig, by shooting the deceased with pistols and revolvers, such indictment is not insufficient because it alleges that "said pistols and revolvers the said John Taylor, Wm. Brown and Thomas Craig then and there in their right hands held," when they did the shooting. (*State v. Brown*, 21 K. 38.)

622. Upon the trial of a criminal case, where the defendant is charged with murder, and the evidence tends to show that at the time of the killing the deceased was under arrest upon a charge of killing certain Indians, and of stealing property belonging to Indians, and some of the evidence tends to show that the deceased was killed by Indians, and not by the defendant, and the prosecution introduced evidence tending to show that the Indians did not, at the time of the killing, believe that the deceased was guilty of killing their comrades, or of stealing their property, but believed that he was innocent thereof, *held*, that the defendant may, as rebutting evidence, show that the Indians must have believed that the deceased was guilty of killing their comrades and of stealing their property; and, for the purpose of doing this, he may show the acts and confessions of the deceased, in the presence of the Indians, when he was charged with killing the said Indians and stealing the Indians' property. (*State v. Brown*, 21 K. 38.)

623. Where the prosecution in a criminal case introduces evidence showing a portion of a certain conversation had between the defendant and a third person, the defendant may introduce evidence showing the rest of such conversation. (*State v. Brown*, 21 K. 38.)

624. On May 27, 1866, C. was killed, while sitting in the door of his house, by a bullet from a pistol, alleged to have been discharged by one P. *Held*, That the declaration of the wife of the deceased, made to persons one hour after the death of her husband, that she recognized P. as the person who killed

her husband, forms no part of the *res gestæ*. (*State v. Petty*, 21 K. 54.)

625. When a witness is assailed on the ground that he narrated the facts differently on a former occasion, it is ordinarily incompetent to sustain him by proof that on other occasions his statements were in harmony with those on the trial. To this rule there are exceptions. Thus, where the impeachment goes to contradict the witness by prior inconsistent declarations, and charges him with a recent fabrication of his testimony, it is proper to show that the same account was given by him to other persons anterior to the date of the alleged fabrication. In order, however, that the confirmatory statements of the witness shall be admitted, it must clearly appear that they were made antecedently to the contradictory declaration given in evidence. (*State v. Petty*, 21 K. 54.)

626. The case of *Smith v. State*, 1 K. 365, cited, as to the sufficiency of the indictment in charging the crime of murder in the first degree. (*State v. Petty*, 21 K. 54.)

627. In trials for homicide, evidence of threats made by the deceased person against the defendant, but not communicated to him before the killing, is admissible in cases where the acts of the deceased in reference to the fatal meeting are of a doubtful character. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that at the time of the meeting the deceased was seeking defendant's life. (*State v. Brown*, 22 K. 222.)

628. Where evidence of communicated threats has been admitted, it is competent for the purpose of corroborating such evidence to introduce evidence of uncommunicated threats. (*State v. Brown*, 22 K. 222.)

629. Where the bailiff in charge of a jury in a trial for murder enters the jury room during the deliberation of the jury on their verdict, and reads to them portions of the instructions, held, such misconduct as to demand the annulment of the verdict, and the setting aside of the sentence and judgment, notwithstanding the officer testifies he read the portions of the instructions at the request of the jury because they could not

read them, and that he read the same correctly. (*State v. Brown*, 22 K. 222.)

630. A general assertion is made that § 8, ch. 31, Comp. Laws 1879, is unconstitutional and void. No reasons are given nor any argument presented in support of this view. Said section fixes the minimum penalty for those convicted of murder in the second degree, and the maximum penalty is fixed by § 291 of the same chapter. Secs. 8 and 291 are to be construed together. These sections are valid and constitutional. (*State v. Pierce*, 23 K. 153.)

631. An information is not insufficient, merely because it states in one count that the assault, battery and killing, charged against the defendant, were done by means of "some deadly weapon or instrument, the kind and description of which are unknown," and then states, in another count, that such assault, battery and killing were done by means of the defendant's "hand and fist." (*State v. O'Kane*, 23 K. 244.)

632. Where an information charges an offense which includes both a misdemeanor and a felony, and the jury find the defendant guilty of the misdemeanor only, the defendant should pay costs only as for a misdemeanor. (*State v. O'Kane*, 23 K. 244.)

633. A defendant may be charged with committing murder in the first degree, and then be convicted, on such charge, of committing an assault and battery only, provided, however, that the assault and battery are necessarily included in such charge. (*State v. O'Kane*, 23 K. 244.)

634. On the trial of a party charged with the crime of murder in the second degree, the defendant was represented by three counsel. The county attorney was at his request assisted by one counsel, whose compensation was received from the father of the deceased. Notwithstanding the objections of defendant, the court permitted such private counsel to assist in the trial. After the state had rested and defendant had commenced offering testimony, it was disclosed that such assisting counsel had been, pending the trial, appointed deputy county attorney. Objection was made to his further participation in

the trial, and overruled. Nothing in the record tends to show any surrender of the control of the prosecution by the county attorney, or any ungentlemanly or any unprofessional conduct on the part of the assistant counsel, or any undue zeal in the prosecution, or any oppression of the defendant. *Held*, That no error affecting the substantial rights of defendant, or calling for a reversal of the judgment against him, appears from such participation of privately employed counsel in the trial. (*State v. Wilson*, 24 K. 189.)

635. Defendant was arrested and a preliminary examination held on a charge of an assault with intent to kill. On such examination the testimony of the party assaulted was taken. This testimony was taken at the rooms of the witness, he being unable to move therefrom, and in the presence of the justice and the counsel for defendant, the defendant himself being absent. He could have been present if he had desired, but preferred not to be. Subsequently the party assaulted died, and a charge of murder was preferred in lieu of the original charge of assault with intent to kill. Upon the trial upon this charge, evidence was received of the testimony given by such deceased witness on the preliminary examination. *Held*, No error. (*State v. Wilson*, 24 K. 189.)

636. The admission of this testimony did not render incompetent and inadmissible evidence of the dying declarations of such deceased witness subsequently made. (*State v. Wilson*, 24 K. 189.)

637. Dying declarations, to be admissible, must be made under a sense of impending death; but it is not necessary that the declarant state that he is expecting immediate death; it is enough if, from all the circumstances, it satisfactorily appears that such was the condition of his mind at the time of the declarations. (*State v. Wilson*, 24 K. 189.)

638. A witness was called who heard the dying declarations, and testified at the time he made a minute or memorandum of them. *Held*, That as such memorandum was not of itself competent evidence, and could only be used to refresh the witness's recollection, the witness might testify as to the declarations

without producing the memorandum, and without such evidence of its loss and a proper search for it as would open the door to parol testimony as to its contents as a lost instrument. (*State v. Wilson*, 24 K. 189.)

639. An indictment which charges a deliberate and premeditated intent to kill and murder; that with this intent the defendant made a deliberate and premeditated assault; that this assault was with a rifle or gun, leaden balls, etc.; that by this assault he gave to deceased a mortal wound, of which wound deceased then and there died, sufficiently charges the crime of murder in the first degree. The testimony briefly reviewed, and held sufficient to sustain the verdict. (*State v. Stackhouse*, 24 K. 445.)

640. Upon a trial of a murder case, a witness was permitted to testify over the objections of defendant as to threats and expressions of dislike made by defendant towards the deceased, and another was asked upon what terms the defendant and deceased were, whether friendly or unfriendly; *held*, no error. (*State v. Stackhouse*, 24 K. 445.)

641. A court, at every separation of a jury and at each adjournment in a criminal trial, should give the statutory admonition; but where it appears that at the first adjournment, and before any separation of the jury was had, the court had given this admonition, and had stated to the jury that the duty thus declared rested upon them whenever out of the jury box, until the close of the trial, and that the admonition was duly given at each adjournment thereafter, and the record discloses a trial otherwise fair and impartial, the judgment will not be reversed simply because, during the sessions of the court, several recesses of from three to five minutes' duration, are shown to have taken place without this admonition being given as preliminary thereto; and this, although the record is silent as to what took place during such recesses, and as to whether any of the jurors left the court room or not. (*State v. Stackhouse*, 24 K. 445.)

642. The testimony briefly reviewed, and held sufficient to sustain the verdict. (*State v. Stackhouse*, 24 K. 445.)

643. On the hearing of a motion, the court may permit a witness to be called before it, and examined and cross examined orally in its presence, and is not compelled to receive affidavits alone. (*State v. Stackhouse*, 24 K. 445.)

644. Where a defendant is charged on information with committing murder in the first degree, and "the jury find the defendant guilty in manner and form as charged in the information," without otherwise stating the degree of the offense of which they find the defendant guilty, and no motion for a new trial is made, and the court sentences the defendant as for murder in the first degree, and the record of the case does not show that the defendant was informed by the court of the verdict of the jury, and asked whether he had any legal cause to show why judgment should not be pronounced against him, *held*, that the judgment of the court below must be set aside, and the cause remanded with the order that the defendant must be again taken before the court below for sentence and judgment, and for such other and further proceedings as may be properly had in the case, and that before sentence or judgment shall be again pronounced against him, he shall "be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him." (Comp. Laws of 1879, p. 761, § 248.) HORTON, C. J., *dissenting*. (*State v. Jennings*, 24 K. 642.)

645. In a criminal prosecution for murder in the first degree, the trial court refused to give to the jury the following instruction: "The jury are further instructed, that the fact alone by itself that the deceased was killed by defendant is not sufficient to establish a malicious intent." *Held*, That while in many cases the above instruction would be good law, in the present case, for reasons given in the opinion, the instruction would be misleading and erroneous, and therefore that the trial court did not err in refusing to give it. (*State v. Mahn*, 25 K. 182.)

646. In such criminal prosecution, where the trial court gave ample instructions to the jury with regard to insanity and dis-

ease of the mind, without, however, mentioning any specific drug or liquor as a cause for the same, *held*, nevertheless, that the trial court did not err in refusing to give an instruction referring to morphine as a cause for such supposed insanity or disease of the mind. (*State v. Mahn*, 25 K. 182.)

647. And *further held*, in such case, that the trial court did not err in refusing to give any instruction referring to insanity, where such instructions were substantially given in other instructions. (*State v. Mahn*, 25 K. 182.)

648. And where the defendant in a criminal case asked the court to instruct the jury, that "in order to entitle the defendant to an acquittal, he is required only to *raise* a reasonable doubt as to his sanity," and the court modified the instruction and gave it as follows: "In order to entitle the defendant to an acquittal, he is required only, by evidence, to *establish* a reasonable doubt as to his sanity:" *Held*, That the court did not err. (*State v. Mahn*, 25 K. 182.)

649. While a premeditated, deliberate intent to take life is essential to the crime of murder in the first degree, yet if a party goes to have an interview with another, having armed himself with a deadly weapon, with the intent to compel such other to do any certain thing, or upon his refusal to kill him, such conditional intent to take life is sufficient to make the homicide, if committed, murder in the first degree. (*State v. Kearley*, 26 K. 77.)

650. It is ordinarily sufficient if the court in its charge to the jury state once, fully and clearly, the general propositions of law applicable to the case, such as those concerning reasonable doubt and the presumption of innocence, and it is seldom error if it fails to restate those propositions in connection with any separate and special phase of the case. (*State v. Kearley*, 26 K. 77.)

651. The court, in attempting to define reasonable doubt, said: "That to exclude such doubt, the evidence must be such as to produce in the minds of prudent men such certainty that they would act on the conviction without hesitation, in their

own most important affairs." *Held*, That such definition and explanation did not narrow the import of the phrase "reasonable doubt" to the prejudice of the substantial rights of the defendant. (*State v. Kearley*, 26 K. 77.)

652. Where parties meet, and in an affray one is killed, *held*, that an instruction was properly refused which seemed to limit the consideration of the jury to the mere circumstances of the interview, and excluded any consideration of the evident angry feelings under which the parties met. (*State v. Kearley*, 26 K. 77.)

653. Where newly-discovered testimony runs simply to the matter of threats, and only tends to make more emphatic and clear what is already plain by the testimony, that the parties at the time of meeting were enraged against each other, *held*, that the court did not err in refusing a new trial on this ground. (*State v. Kearley*, 26 K. 77.)

654. Where a party in apparent good health is assailed, his body pierced with three bullet wounds, and he thereupon falls to the ground and dies within thirty minutes, *held*, that a new trial was properly refused when sought on the ground that certain competent physicians had been found who would testify that none of the wounds described were necessarily fatal. (*State v. Kearley*, 26 K. 77.)

655. Where it affirmatively appears that a bill of exceptions, though allowed and signed during the term, was not filed until many months thereafter and until two regular terms had intervened, *held*, that it never became a part of the record, and presents nothing upon which this court can act, and this whether the action was one criminal or civil. (*Brown v. Rhodes*, 1 K. 364; *The State v. Bohan*, 19 K. 28; *State v. Schoenewald*, 26 K. 288.)

656. Where an information for murder in the first degree describes the killing, and clearly alleges that the killing was done willfully, unlawfully, feloniously, and with deliberation, premeditation, and malice aforethought, such information is sufficient, and especially so where the question of its sufficiency

is not raised until after the verdict has been rendered. (*State v. Jackson*, 27 K. 581.)

657. In a criminal prosecution for murder in the first degree, it was ascertained, after the verdict was rendered, that two of the jurors had voluntarily borne arms against the government of the United States, during the war of the rebellion, and that their consequent disabilities had not been removed, and therefore that they were not electors of the state of Kansas, and therefore were not proper persons to serve as jurors. No objection had previously been made to these jurors serving in the case, and it does not appear that any effort had been made, previous to the rendering of the verdict, to ascertain whether they were competent jurors or not. After the verdict was rendered, and the defendant found guilty of murder in the first degree, as charged in the information, the defendant then moved for a new trial, and also an arrest of judgment, because of the incompetency of these two jurors. *Held*, That the fact that these two jurors were not electors was not an absolute disqualification, but only a ground for challenge; that their disqualification would have been a proper ground for discharging them from the jury before they were sworn, but is not a sufficient ground for granting the defendant a new trial, or for arresting the judgment after the verdict was rendered; and where no objection is made because of such disqualification until after the verdict is rendered, the objection is made too late. (*State v. Jackson*, 27 K. 581.)

658. The defendant was prosecuted, convicted and sentenced for murder in the first degree. While impaneling the jury, one of the jurors stated on his *voir dire* that he was convinced that the deceased was dead and that the defendant had killed him, and that it would require a great deal of evidence to remove this conviction. The defendant challenged the juror for cause, but the trial court overruled the challenge. It appeared from the questions asked by the defendant's counsel to other jurors before this challenge was overruled, that the death of the deceased and the killing of him by the defendant were con-

ceded. Also, immediately after the jury was impaneled, the defendant's counsel stated to the jury that it would appear from the evidence that the defendant had killed the deceased, but that it would be shown that the killing was done in self defense; and the evidence did in fact show, beyond all doubt, that the deceased was killed by the defendant; and the record of the case also contains the following concession made by the defendant's counsel after the trial of the case, to wit: "It is conceded by counsel for defendant, that the verdict is sustained by the evidence and justified by the testimony." And the verdict of the jury was undoubtedly right. *Held*, That the trial court did not commit any material or substantial error in overruling the defendant's challenge of the juror for cause. (*State v. Wells*, 28 K. 321.)

659. Where an information charges that the defendant, armed with a deadly weapon, known as a revolver, (the exact description of which cannot be given,) loaded with gunpowder, leaden balls and percussion, then and there held in the hand of defendant, on or about the 4th day of April, 1882, at the county of Chase and state of Kansas, then and there being, did then and there feloniously, willfully, intentionally, deliberately, premeditatedly, with felonious intent and with malice aforethought, shoot, kill and murder one B. with the aforesaid deadly weapon then and there held in his hand, by inflicting two mortal wounds, either of which was fatal, with the aforesaid deadly weapon held in the hand of the defendant, *held*, that the said information charges the killing of B. was intentional, willful, deliberate and premeditated. (*State v. Bridges*, 29 K. 138.)

660. The court, in defining the phrase "reasonable doubt," instructed the jury as follows: "The words 'reasonable doubt' mean what they imply; that is, that the doubt must be a reasonable one, such a doubt as might exist in the mind of a man of ordinary prudence when he was called upon to determine which of two courses he would pursue in a matter of grave importance to himself, when two courses are open to him, and the taking of one would lead to a different result from the taking

of the other, and it would be impossible for him to determine as to which of the two results would be most advantageous to him." *Held*, The explanation not sufficiently clear or intelligible to direct or benefit the jury. (*State v. Bridges*, 29 K. 138.)

661. If the court deems it necessary in a criminal action to define or explain the phrase "reasonable doubt" to a jury, the following is as clear as any: "A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is, to a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it." (*State v. Bridges*, 29 K. 138.)

662. Where a verdict finding a defendant guilty of murder in the second degree is challenged in a motion for a new trial, upon the ground that it is not sustained by sufficient evidence, and the district judge announces that he declines to look into the evidence or pass upon its sufficiency, and then overrules the motion *pro forma*, and the evidence in the case is greatly conflicting and about equally balanced, *held*, that the rendering of the judgment upon the verdict by the trial judge without his approval thereof is in such a case a material error, and one for which the judgment must be reversed and a new trial granted. (*State v. Bridges*, 29 K. 138.)

663. Where an information follows the language of the statute in charging the crime of murder in the first degree, the use of the words "of malice aforethought" is not essential to its validity. (*State v. Fooks*, 29 K. 425.)

664. Where an information charging the crime of murder in the first degree alleges an unlawful, felonious, willful, deliberate and premeditated assault with a pistol, commonly called a revolver, charged with gunpowder and leaden bullets; a felonious, willful, deliberate and premeditated shooting and wounding of the deceased; a felonious, willful, deliberate and premeditated intention to kill and murder the deceased; that the

wounding was mortal, and that the wounded man instantly died of the mortal wounds, all the elements of the crime of murder in the first degree, as defined in the statute, are embraced therein, and the use of the words "that the defendant, him, the said deceased, in manner and form aforesaid, feloniously did kill and murder" is not essential to its validity. (*State v. Fooks*, 29 K. 425.)

665. Certain evidence was produced upon the trial against the defendant, charged with murder in the first degree, tending to impeach the wife of the defendant, who had testified in his behalf; thereupon the defendant asked the court to withdraw from the jury the evidence, upon the ground that no sufficient foundation had been laid therefor, and because it was irrelevant and incompetent. The court overruled the motion and the defendant excepted. Soon thereafter the court reconsidered its action, and of its own motion ruled out and took from the jury the evidence objected to. *Held*, No material error was committed thereby. (*State v. Fooks*, 29 K. 425.)

666. In an information for murder, the location of the wound is sufficiently described as "upon the body." (*State v. Yordi*, 30 K. 221.)

667. A failure to give three days' notice to the sheriff and two justices of the peace, as prescribed by § 10, ch. 54, Comp. Laws of 1879, will not vitiate the drawing of jurors, if at the time of such drawing the sheriff and two justices are in fact present. The purpose of the notice is to secure the presence of these officers, and if they are in fact present, the time of notice becomes immaterial. (*State v. Yordi*, 30 K. 221.)

668. Where a challenge to an array of jurors is sustained on account of some irregularity in the drawing, the jurors are not thereby personally disqualified to serve as jurors; and it is no ground of challenge to a juror, when called from the bystanders by the sheriff, or summoned by the court on a special *venire*, that he was one of an array which had been successfully challenged as above. (*State v. Yordi*, 30 K. 221.)

669. It is not error for counsel, in argument to the jury, to

comment on the omission to introduce testimony, and draw any legitimate inferences from such omission; nor is it improper for them to express their opinions as to the intentions of a party in any transaction in issue or disclosed by the testimony. (*State v. Fordi*, 30 K. 221.)

670. Where there appears what can be considered as only a slight overstepping of the proper limits of argument to the jury, which is not objected to or noticed at the time, or until the presentation of a motion for a new trial, and the trial court overrules the motion, and the verdict is apparently fully sustained by the testimony, *held*, that this court ought not to set aside the judgment. (*State v. Fordi*, 30 K. 221.)

671. Where a defendant is convicted of murder, and on a motion for a new trial it is shown that pending the trial and during the recess of the court, one of the jurors was present in a company, one of whom stated that defendant had been previously guilty of a like crime, but it is doubtful whether the juror heard the statement, and it does not appear to have been made by one interested in the prosecution or seeking to influence any juror, and the testimony is amply sufficient to sustain the verdict, and the motion is overruled, *held*, that this court will not set aside the conviction. (*State v. Fordi*, 30 K. 221.)

672. The defendant was prosecuted, convicted and sentenced for murder in the first degree. The defendant and the deceased resided and the offense was committed in Ellsworth county, Kansas. The defendant admitted the killing, but claimed it was done in self defense. The defendant introduced two certain depositions in evidence on the trial. These depositions stated, among other things, that while the deceased resided in Hanover township, Ashland county, Ohio, "His occupation was burning charcoal, getting out ties, and stealing," and "his occupation was farming, stealing, and driving team." The trial court struck out the word "stealing" from these depositions. *Held*, Not error. (*State v. Rose*, 30 K. 501.)

673. The court gave the following instruction, among others, to the jury: "27. I have given you already the definition of

justifiable homicide. That portion of the definition applicable here is as follows: 'Homicide shall be justifiable when committed by any person, . . . in the lawful defense of such person, . . . when there shall be a reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be immediate danger of such design being accomplished.' By this definition we see, that before a person can take the life of another, it must reasonably appear that his own life must have been in imminent danger, or that he was in imminent danger of some great bodily injury from the hands of the person killed. No one can attack and kill another because he may fear injury at some future time." *Held*, That, in the light of the evidence and the other instructions to the jury, this instruction was not misleading or erroneous. (*State v. Rose*, 30 K. 501.)

674. There was sufficient testimony to overthrow the theory of suicide and establish the charge that the appellant was guilty of murdering the deceased by means of strychnine. Twelve jurymen heard the living voices of the witnesses, saw the parties who uttered them, and the trial judge approved their verdict; therefore we have before us not only the verdict of the jury, but also the indorsement of that verdict by the trial judge, and this court cannot decide upon the record that the and jury ought to have believed and found that the deceased committed suicide by poisoning herself. Even if the court erred, on the authority of *Kelsey v. Layne*, 28 K. 218, in permitting the witness Wasson, for the purpose of impeaching the defendant, to testify that she told him she was forty-three years of age, without sufficient foundation having been laid for the introduction of this evidence, it was not such error, under the circumstances of the case, as would justify a reversal of the judgment. The remarks of one of the attorneys representing the prosecution, in his closing argument, were not so intemperate or prejudicial as to demand, in our opinion, a new trial. (*Winter v. Sass*, 19 K. 566; *State v. Comstock*, 20 K. 650; *State v. Martin*, 31 K. 353.)

675. The statute authorizes the charging of an accessory before the fact as a principal. (*State v. Cassady*, 12 K. 550; *State v. Mosley*, 31 K. 355.)

676. Upon the trial of an accessory before the fact, the record of the conviction of the principal is proof *prima facie* of that fact; but this is not conclusive, and other evidence of the commission of the crime by the principal is admissible. (*State v. Mosley*, 31 K. 355.)

677. Upon the trial of a defendant charged with a criminal offense, the latter rested without testifying. The state introduced a witness and offered to prove certain facts, to which the defendant objected as not being proper rebuttal. Thereupon the county attorney said to the court, in the hearing and presence of the jury: "Your honor, we had a right to presume that the defendant would testify as a witness in his own behalf, in which case this evidence would have been proper rebuttal, and he having failed to do so, we claim the right to introduce it now." *Held*, That these remarks to the court were not such an infringement upon the statute forbidding the prosecuting attorney to refer to the fact that the defendant did not testify in his own behalf as, requires us under the circumstances of this case, to grant a new trial. (*State v. Mosley*, 31 K. 355.)

678. Where an information for murder alleges the offense was committed "on or about the 11th day of August, 1882," the words "or about," in view of the provisions of our criminal code, may be treated as surplusage, and the averment in the information as to time is sufficiently certain and specific. (Crim. Code, §§ 105, 110.) (*State v. Barnett*, 3 K. 250; *State v. Harp*, 31 K. 496.)

679. Where an information alleges that "one H., on August 11, 1882, at and within the county of C., with a deadly weapon, to wit, a large knife or dirk, which he, the said H., then and there held in his hand, and then and there did strike at and upon the body of one B., and did then and there willfully, deliberately, premeditatedly, and with malice aforethought, cut and stab the said B. in the abdomen, thereby inflicting upon

the body of said B. one certain mortal wound, whereof he, the said B., then and there died, wherefore, it is hereby charged that the said H., on August 11, 1882, at and within the county of C. and state of Kansas, did willfully, feloniously, deliberately and premeditatedly kill and murder the said B., contrary to the statute in such case made and provided, and against the peace and dignity of the state of Kansas, and is therefore guilty of the offense of murder in the first degree," *held*, the information is sufficient, as against a motion in arrest of judgment, to sustain a conviction of murder in the second degree. (*State v. Harp*, 31 K. 496.)

680. An indictment was pending against defendant, charging him with the crime of murder. While so pending, a preliminary examination was held, and an information filed, based upon such preliminary examination and charging the same offense as in the indictment. On the first day of the ensuing term of the district court, the indictment was, with leave of the court, *nollied*. Thereafter the defendant was arraigned upon the information, and plead in abatement the pendency of the indictment at the time of the preliminary examination and the filing of the information. *Held*, That the plea was properly overruled. (*State v. McKinney*, 31 K. 570.)

681. A jury was regularly drawn and summoned to attend the February, 1883, term of the Butler county district court. That county was then a part of the thirteenth judicial district, and the regular term fixed for the third Tuesday of February. Thereafter, on February 6, 1883, a law took effect creating the eighteenth judicial district, and assigning Butler county to that district. The first term fixed by that law thereafter commenced on the first Tuesday of May, 1883. Without any new drawing or summoning, the jury above named appeared at the May term. The act creating the eighteenth district provided, among other things, that all proceedings of every kind and character, and all processes of every kind and character, pending in any of the courts of the counties named in the law, should stand, be returnable and triable at the first term of the court for said

counties, the same as if the change therein contemplated had not been made. *Held*, That a challenge to the array was properly overruled. (*State v. McKinney*, 31 K. 570.)

682. Where counsel, even in a capital case, agree that the court shall name the persons to be summoned to attend as jurors, and that no person shall be named residing in certain townships, and by mistake one is named who resides therein, *held*, that although such juror on his examination did not appear personally disqualified, the court did not err in setting him aside. (*State v. McKinney*, 31 K. 570.)

683. The court may in its discretion permit the county attorney to indorse the names of witnesses on the information, even if the trial has commenced. (*State v. McKinney*, 31 K. 570.)

684. Where, in a capital case, a map of the locality has been introduced in evidence, and the place of the homicide identified thereon by other witnesses, *held*, that there is no error in asking a witness if the place of the homicide had been shown to him, to point it out on the map, and to locate a house and other objects with reference thereto. (*State v. McKinney*, 31 K. 570.)

685. It is always competent to introduce testimony in a capital case tending to show possession in the defendant of the means of committing the homicide in the manner in which it was committed, and also threats and ill feeling on his part toward the deceased. And the competency of such testimony does not turn on the question whether it is or is not absolutely conclusive upon those matters; it is enough that it fairly tends to prove them, and then its weight is to be determined by the jury. Hence testimony is admissible as to a fight between the deceased and defendant ten months before the homicide, and of the defendant being beaten in that fight; of threats by the defendant a month or two before the homicide; and of his possession of a pistol, the deceased having been killed by a pistol ball. (*State v. McKinney*, 31 K. 570.)

686. Where, on the trial of a person charged with murder, more than a year after a homicide, a witness for the defendant had testified to certain material facts, and this witness had re-

sided in the immediate vicinity all the time, was aware of the homicide and the consequent excitement, of the instant arrest and examination of the defendant, and his commitment for trial, and where the facts so testified to, to wit, the appearance of three strangers riding rapidly away from the place of the homicide right after the time it must have taken place, were of a character to have an obvious bearing on the question of the guilt of the defendant, and such also as any person would ordinarily disclose, *held*, that the state might on cross examination ask the witness who he told, if any one, of these facts; and upon certain persons being named, might also, in the discretion of the court, prove by such persons that nothing of the kind was ever told them. The silence of a witness is sometimes an impeaching fact, as well as his contradictory statements, and when it is, it may be proved by himself or others. (*State v. McKinney*, 31 K. 570.)

687. Where, for the purpose of impeaching a witness for the state, the defendant introduces witnesses who testify that at the preliminary examination they heard the former witness, and that he did not then mention the facts testified to by him on the trial, *held*, that the state might in rebuttal call other witnesses also present at such examination to testify that they heard the witness, and that he did then mention these facts. (*State v. McKinney*, 31 K. 570.)

688. It is not essential that the admonition to be given to the jury at the time of each adjournment be in the very language of the statute; it is enough that the duty of the jury is fully and clearly disclosed to them by the court; and an admonition not to converse "in regard to this case" is, when no objection is made at the time, sufficient, although the language of the statute is "on any subject connected with the trial." (*State v. McKinney*, 31 K. 570.)

689. The court may permit a separation of the jury after the instructions, during the arguments of counsel, and at any time before they finally retire under charge of their bailiff for deliberation. (*State v. McKinney*, 31 K. 570.)

690. The court closed its instructions to the jury with these words: "It is claimed that a violated law, by the commission of a brutal and blood-curdling, cruel crime lies in one scale of the balance, and the liberty and life, all that there is dear and valuable in life to the citizen, freights the other. I have already instructed you that the defendant is presumed innocent until his guilt is made to appear beyond a reasonable doubt, to be determined by the rules given you in these instructions. No disastrous consequences to result to the defendant as the results of your verdict, or the clamors of a discontented populace, can properly find place for consideration in your deliberations; but the imperative and inexorable demands of the duty imposed on you are, to seek for the truth and fearlessly pursue it in your verdict." *Held*, That the testimony tending to show a wanton and cold-blooded murder, there was no error in stating, in the language used, the claims of the two parties, and that it cannot be presumed that there was no occasion for cautioning the jury against the improper influences named. (*State v. McKinney*, 31 K. 570.)

691. Where in a murder case neither the defendant nor his wife testified in his behalf, and it appears that after the verdict had been agreed upon, reduced to writing, signed by the foreman and placed in a sealed envelope, and while the jury were waiting to be called into the court room, there was some conversation between them as to the fact that his wife did not testify, and that if certain facts bearing strongly against the defendant were not true, she could have contradicted or explained them, *held*, that notwithstanding the last proviso in §215 of the code of criminal procedure, there was no error in refusing to set aside the verdict. (*State v. McKinney*, 31 K. 570.)

692. After the jury had retired for deliberation the court adjourned to the next morning. During such adjournment, they sent word that they had agreed upon the verdict. In pursuance thereof they were brought into the court room. The judge and all of the officers of the court were present. The defendant and the counsel on both sides were present. Without ob-

jection the verdict was received, opened, and read; and then, at the instance of defendant, the jury was polled. *Held*, That although the verdict was not, as the statute provides, "rendered in open court," yet the error was simply a technical one, no substantial rights of the defendant were trespassed upon, and that under § 293 of the criminal code, the error must be disregarded on appeal. (*State v. McKinney*, 31 K. 570.)

693. In a criminal prosecution for a felony, where the defendant interposes a plea in abatement, upon the ground that he has not had any proper preliminary examination, *held*, that the only questions presented to the court for consideration are, whether an attempt has been made to give the defendant a preliminary examination; and whether, by such attempt, reasonable notice has been given to him with regard to the nature and character of the offense charged against him. And it is not necessary, in such a case, that the papers and proceedings on the preliminary examination should be technically regular and exact, like the papers and proceedings required on the final trial. It is not necessary that the papers and proceedings on the preliminary examination should set forth the offense in all its details, and with perfect and exhaustive accuracy. For the purpose of authorizing a final trial, and requiring that the defendant should plead to the merits of the action, all that is necessary is, that the defendant should be given a fair opportunity to know, by a proffered preliminary examination, the general character and outlines of the offense charged against him; and it is not necessary that all the details and technical averments, required in an information, should be set forth in the papers used on the preliminary examination; and the defendant should take notice, from the evidence introduced by the state on the preliminary examination, as well as from the papers in the case, of the nature and character of the offense charged against him. (*State v. Bailey*, 32 K. 83.)

694. The trial court in a criminal prosecution for murder in the first degree established a rule for the impaneling of the jury, that the state should exercise one of its peremptory chal-

lenges, and then the defendant should exercise two of his peremptory challenges, and then the state should exercise one and the defendant two, and so on, alternately, until all the peremptory challenges, given by law to the parties, should be exhausted, the state having six peremptory challenges, and the defendant twelve. *Held*, (1) That the court did not err in establishing such rule; and further *held*, (2) that as the defendant waived the eighth, ninth, tenth, eleventh and twelfth of his peremptory challenges, and voluntarily refrained from exercising the same, the error would be immaterial even if such ruling had been erroneous. (*State v. Bailey*, 32 K. 83.)

695. And in such criminal prosecution, where incompetent evidence, injurious to the defendant, is drawn out by the defendant on the cross examination of one of the witnesses for the state, and is not otherwise introduced on the trial, *held*, that the trial court did not err as against the defendant in permitting such incompetent evidence to be introduced. (*State v. Bailey*, 32 K. 83.)

696. It is not necessary for a trial court to repeat its instructions to the jury, or to give the substance of the same more than once; and it is not error to refuse to give an instruction which, if given, would be misleading. (*State v. Bailey*, 32 K. 83.)

697. In a criminal case, after the jury have retired to consider of their verdict, it is misconduct for a bailiff to enter the jury room while the jury are in session; and it would be gross misconduct for the bailiff, or any one else, to enter the jury room while the jury were in actual consultation or deliberation with regard to their verdict; but such was not done in the present case. It is also misconduct for the jury to separate after retiring to consider of their verdict and before rendering their verdict. (*State v. Bailey*, 32 K. 83.)

698. It is also misconduct for them to eat anything during such time, except with the express permission of the court; and where such misconduct is shown on the part of the bailiff or jury, it then devolves upon the prosecution to show that noth-

ing transpired which could in the least have influenced any member of the jury adversely to the interest of the defendant. Such was done in the present case, by the oral testimony of every member of the jury, and of the bailiff and others; therefore, *held*, that although there was misconduct on the part of the jury and bailiff in the present case, still that the defendant is not entitled to a new trial on the ground of such misconduct. (*State v. Bailey*, 32 K. 83.)

699. Evidence discussed, and held sufficient to sustain the verdict of the jury. (*State v. Bailey*, 32 K. 83.)

700. Where a person at the time of the commission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible, if he commits such act or acts, whatever may be his capacity in other particulars. But if he does not possess this degree of capacity, then he is not so responsible. (*State v. Nixon*, 32 K. 205.)

701. In a criminal prosecution, where the jury entertain a reasonable doubt as to whether the defendant is sane or insane with respect to the particular acts charged against him, they should acquit; and *held*, that the court below charged the jury in substance to this effect. (*State v. Nixon*, 32 K. 205.)

702. In a criminal prosecution against a husband and wife for murder in the first degree, where the wife is tried separately, she has no right to prove the declarations of her husband made the day before the killing, and made only in the presence and hearing of third persons having no connection with the controversy which resulted in the death of the person alleged to have been murdered. (*State v. Hendricks*, 32 K. 559.)

703. If a witness be impeached by proof of his having previously made statements out of court inconsistent with his testimony in court, he may then be corroborated by evidence of other statements made by him out of court in harmony with his testimony, if made immediately after the occurrences of which he has testified took place, and made before he has had

any reason or ground for fabricating an untrue or false statement; and such corroborating evidence is not limited to those statements made by him before the time when his statements given in evidence to impeach him were made, but may be extended to other statements made by him afterward. (*State v. Hendricks*, 32 K. 559.)

704. The laws of Kansas do not presume that a wife who unites with her husband in the commission of a crime acts under his coercion. On the contrary, the laws of Kansas presume that all persons of mature age and sound mind act upon their own volition and are responsible for their acts. The question whether a wife acted under the coercion of her husband or not is a question of fact which should in all cases be left to the jury. (*State v. Hendricks*, 32 K. 559.)

705. Instructions in a criminal prosecution for murder in the first degree, as well as in other cases, should run to the facts as detailed by the evidence, and to all probable interpretations of them, but not to questions which, though possible under the information, are not in fact presented by the evidence; and *held*, in this particular case, that the trial court did not commit material error in failing to instruct the jury upon the several degrees of manslaughter. (*State v. Hendricks*, 32 K. 559.)

706. The court in a criminal prosecution for murder in the first degree, as well as in other cases, may permit a separation of the jury after the instructions are given and before the arguments of counsel are fully completed, and indeed at any time before the jury are allowed to retire under the charge of their bailiff for final deliberation upon their verdict. (*State v. Hendricks*, 32 K. 559.)

707. In an information charging the defendant with murder, the name of the person killed was alleged to be "Bernhart," and upon the trial his name was given by the different witnesses as "Banhart," "Benhart," "Beanhart" and "Bernhart." *Held*, That an instruction by the court, that a mere difference in the spelling of the name which the deceased bore, and that alleged in the information to have been his name, is immaterial, if the

name proved be *idem sonans* with that stated in the information, was not inapplicable or erroneous. (*State v. Witt*, 34 K. 488.)

708. As a general rule, the name of the person injured should be stated in the indictment or information with sufficient certainty so that the accused may know of what offense he is charged; but where the person injured is so well described, and his name is so given that his identity cannot be mistaken, the object of the rule has been accomplished. (*State v. Witt*, 34 K. 488.)

709. It is not error for the court to refuse a special instruction that if any one of the jury entertain a reasonable doubt of the defendant's guilt there must be an acquittal. (*State v. Witt*, 34 K. 488.)

710. In the trial of a criminal case, it is the duty of the court, when requested by the defendant, to instruct the jury in regard to the individual duty and responsibility resting upon each member of the jury in determining what the verdict should be. And where the defendant is charged with a capital offense, and the testimony to support the charge is wholly circumstantial, the refusal of the court to give a special instruction requested by the defendant, that "if any one of the jury, after having considered all the evidence in this case, and after having consulted with his fellow jurymen, should entertain a reasonable doubt of the defendant's guilt, or after such consideration and consultation should entertain a reasonable doubt as to whether or not the defendant was present at the time and place of the commission of the alleged homicide, then the jury cannot find the defendant guilty," is reversible error, although the court in its general charge may have instructed the jury as a body that before they can convict they must be satisfied beyond a reasonable doubt of the guilt of the defendant. (*State v. Witt*, 34 K. 488.)

711. The defendant, who was charged with murder, admitted that he shot and killed the deceased, but claimed that the act was justifiable. Upon an examination of the evidence given on

the trial, it is held to be sufficient to sustain a verdict of murder in the second degree. (*State v. Miller*, 35 K. 328.)

712. The testimony given by the defendant on his preliminary examination, and which is reduced to writing and signed by him, may, when properly identified, be offered in evidence by the state against him. (*State v. Miller*, 35 K. 328.)

713. Ordinarily a conspiracy should be established *prima facie* before the acts and declarations of one co-conspirator can be given in evidence against another, and in this case it is held that the conspiracy was sufficiently shown to warrant the admission in evidence of the acts and declarations of those who were charged with aiding and abetting the defendant in the commission of the offense. (*State v. Miller*, 35 K. 328.)

714. When the witness admits that the testimony which she formerly gave in the case was untrue, and then proceeds to state what she claims is a correct relation of the facts, full inquiry should be allowed with respect to what led her to make the so-called untrue statements, as well as the influences which subsequently caused her to change her testimony; but where such witness has quite fully stated what was said and done by those who were urging her to return to the witness stand and tell the truth, the refusal of the question as to what she was crying about in their presence, is not such an error as will work a reversal of the judgment. (*State v. Miller*, 35 K. 328.)

715. The charge of the court is to be considered as an entirety, and if, when so considered, it correctly states the law, the mere misuse of a word in one part of the charge, which it appears could not have misled the jury, will not warrant a reversal. (*State v. Miller*, 35 K. 328.)

716. When the defendant, charged with murder, was convicted of manslaughter in the fourth degree, and thereupon moved for and obtained a new trial, he thereby placed himself in the same position as if no trial had been had, and the conviction for manslaughter in the fourth degree was no bar to a subsequent conviction of a higher degree of the offense charged. (*The State v. McCord*, 8 K. 232; *State v. Miller*, 35 K. 328.)

717. The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial when it is not shown that the jurors read any part of what was written in such transcript. (*State v. Miller*, 35 K. 328.)

718. It is highly important and necessary that the oath should be administered to the jury in a criminal case with due solemnity, in the presence of the prisoner and before the court, and substantially in the manner prescribed by law; but it is no part of the duty of the clerk to place on the record the formulary of words in which the oath is couched. He has performed his duty in that respect when he enters the fact that the jury were duly sworn, and when that is done the presumption will be that the oath was correctly administered. (*State v. Baldwin*, 36 K. 1.)

719. Where the recital in the judgment entry is that the parties appear "and issue being joined upon a plea of not guilty, came a jury, [naming them,] twelve good and lawful men, having the qualifications of jurors, who, being duly elected, tried and sworn well and truly to try the issues joined herein," it cannot be regarded as an attempt to set out in full the oath actually administered, but should rather be considered as a statement by the clerk that the jury had been sworn and acted under oath; and the fact that there is no recital, that the jury were required to give a true verdict according to the law and the evidence, is not a ground for reversal. (*State v. Baldwin*, 36 K. 1.)

720. Where a party desires to avail himself of irregularity in administering the oath to the jury, the attention of the court should be called to it at the time the oath is taken. A party cannot sit silently by and take the chances of acquittal, and subsequently, when convicted, make objections to irregularity in the form of the oath. (*State v. Baldwin*, 36 K. 1.)

721. Not only must the objection be made when the irregularity is committed, but the form in which the oath is taken, as

well as the objection, should be incorporated in the bill of exceptions, in order that this court may see whether or not it is sufficient. (*State v. Baldwin*, 36 K. 1.)

722. Where there are some circumstances which suggest that a person charged to have been murdered committed suicide, it is competent for the prosecution, for the purpose of repelling the theory of suicide, to show by an ordinary witness, who was intimate with the deceased, and was with her the evening before her death, that she was then in good spirits and appeared to be happy. (*State v. Baldwin*, 36 K. 1.)

723. Facts which are made up of a great variety of circumstances and a combination of appearances that cannot be fully described, may be shown by the opinion of ordinary witnesses whose observation is such as to justify it. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things. On the same principle, the emotions or feelings of persons, such as grief, joy and despondency, anger, fear, and excitement, may be likewise shown. (*State v. Baldwin*, 36 K. 1.)

724. The demeanor of one charged with crime, at or near the time of its commission, or of his arrest for the same, may always be shown; and the testimony of the officer who subpoenaed and took the defendant before the coroner's jury, "that he was very nervous and showed a great deal of fear," was admissible. (*State v. Baldwin*, 36 K. 1.)

725. Whether the defendant manifested evidence of grief on account of his sister's death, was a proper inquiry of the state. Such inquiry, however, must be confined to a reasonable time after the death or its discovery; and where the inquiry relating to his conduct covered a period of four months thereafter, it is held to be an unreasonable time, but under the testimony and circumstances of the case it was not prejudicial error. (*State v. Baldwin*, 36 K. 1.)

726. A panel had been cut and taken from the outside door of the house where the offense was committed; and when the

defendant, who was a carpenter, was arrested, a knife was found on his person. Witnesses who were skilled workers in wood were called, and testified that the panel had been cut out with a knife, and that the blade of defendant's knife exactly fitted the place where the panel had been pierced; that it had been cut from the outside by one skilled in the use of tools, and was evidently taken out by one who understood the construction of a door. *Held*, That the manner in which the cutting was done, and the effect of the tools upon the wood, involve skill and experience to judge of, and are not within common experience; and it was proper that the jury should be aided by the experience of experts. (*State v. Baldwin*, 36 K. 1.)

727. A check drawn by the defendant's mother in favor of the deceased for a sum of money, of which the defendant had no knowledge, was not admissible in evidence; but as it had no bearing upon the defendant directly or remotely, it could not affect him injuriously. (*State v. Baldwin*, 36 K. 1.)

728. A letter written by the deceased immediately preceding her death, which showed that she was in a healthy condition of body and mind, and contained nothing prejudicial to the defendant, was admissible in evidence to show the condition of her health and mind, and to repel the theory that she committed suicide. (*State v. Baldwin*, 36 K. 1.)

729. Where the defendant produced a witness who, with a view of showing the conscious innocence of the defendant, testified what his conduct and appearance were soon after the death of his sister, it was proper to inquire, on cross examination, if the witness had not stated at the preliminary examination that the conduct of the defendant impressed him at once as being guilty of the murder. (*State v. Baldwin*, 36 K. 1.)

730. A witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates; but it is only when the memory needs assistance that resort may be had to these aids; and if the witness has an independent recollection of the facts inquired about, there is no necessity nor pro-

priety in his inspecting any writing or memorandum. (*State v. Baldwin*, 36 K. 1.)

731. Where, with a view of impeaching a witness, he is asked if he did not make a certain statement on a previous examination, and he replies that "it amounts to about the same thing," he thereby practically admits the making of the statement, and his answer is insufficient as a foundation for impeachment. (*State v. Baldwin*, 36 K. 1.)

732. Medical and scientific books cannot be admitted in evidence to prove the declarations or opinions which they contain; but a witness who is a medical expert is not confined wholly to his personal experience in the treatment of men, but may give his opinions formed in part from the reading of books prepared by persons of acknowledged ability; and it is not improper for him to give the source of his opinion, and that all the writers and authorities on the subject, so far as he knew, supported him in that opinion. (*State v. Baldwin*, 36 K. 1.)

733. The court charged the jury that, to convict the defendant, it must be shown that he purposely took the life of the deceased by administering poison to her. A murder that is committed by means of poison involves and presupposes the element of malice, premeditation, and deliberation, and hence it was needless for the court to state that they were prerequisites to a conviction. (*State v. Baldwin*, 36 K. 1.)

734. The court takes notice of the meaning and force of the ordinary words of our language, and also of technical words where their meaning is well settled by common usage, and the court may, where it is necessary, define and explain them to the jury. It was therefore not error for the court to instruct the jury as to the ordinary meaning and definition of anæsthetic, chloroform and poison, as given by Webster's dictionary and other works of standard authority, where it appears that the definitions were correct in every respect. (*State v. Baldwin*, 36 K. 1.)

735. The court may review and present the facts in a criminal case, provided the jury are informed that they are the ex-

clusive judges of every question of fact; and hence, where the definitions and comments of the court upon words that are technical and peculiar to a science are in keeping with the testimony given regarding such words, there is no error. (*State v. Baldwin*, 36 K. 1.)

736. As the legislature has published and declared chloroform to be a virulent poison, by a law which all are presumed to know, it was not error for the court to say to the jury that, "in common parlance, chloroform is classed among the poisons," when he couples with the statement the direction that it was still necessary for the jury to find from the evidence that chloroform is a poison, before the defendant could be convicted. (*State v. Baldwin*, 36 K. 1.)

737. The defendant cannot be heard to complain of an instruction requested by himself; and with respect to motive, it was not error for the court to instruct that defendant should be judged by the information upon which he acted, rather than upon the accuracy of his information. (*State v. Baldwin*, 36 K. 1.)

738. The finding of the court upon the question of fact presented in a motion for a new trial, which is made upon oral and conflicting testimony, is as conclusive upon this court as the verdict of a jury founded on like testimony, and which has received the approval of the trial court. (*State v. Baldwin*, 36 K. 1.)

739. A judgment of the district court should not be reversed except for prejudicial error. (*State v. Baldwin*, 36 K. 1.)

740. The evidence in the record examined, and held to be sufficient to sustain a verdict finding the defendant guilty of committing murder by means of poison. (*State v. Baldwin*, 36 K. 1.) [This case was affirmed by the supreme court of the United States.—TAYLOR.]

741. As a general rule it is sufficient if an indictment or information charges an offense in the language of the statute: and even the statutory words need not be strictly pursued, but

others conveying the same meaning may be used. (*State v. McGaffin*, 36 K. 315.)

742. The charging part of an information otherwise sufficient was, that "on the 26th day of November, A. D. 1885, in said county of Wabaunsee in the said state of Kansas, Thomas McGaffin did then and there unlawfully, feloniously, willfully, deliberately and premeditatedly kill and murder one Harrison Sherman, then and there being, by shooting him, the said Harrison Sherman, with a certain pistol commonly called a revolver, then and there loaded with powder and leaden bullets, which said pistol, so as aforesaid loaded with powder and leaden bullets, the said Thomas McGaffin then and there in his hands had and held; contrary to the form," etc. *Held*, That the terms employed in charging the offense are the equivalent of a statement that the killing was done intentionally and with malice aforethought, and express every element of the crime of murder in the first degree. (*State v. McGaffin*, 36 K. 315.)

743. The credit of a witness may be impeached by showing that the statements made in his presence by another, and which were assented to and adopted by him as his own, are contrary to what he has testified at the trial. (*State v. McGaffin*, 36 K. 315.)

744. The exclusion of such testimony upon the main question in the prosecution, where the conviction rests largely upon the evidence given by the witness sought to be impeached, is material error, which compels a reversal of the judgment of conviction. (*State v. McGaffin*, 36 K. 315.)

745. In a criminal prosecution for murder, tried by a jury, where no objection was made to any one of the jurors nor to the array or panel, and there is nothing in the case tending to show that any one of the jurors was incompetent, *held*, that it will be presumed that the jury was a legal and valid jury; and this whether any of the jurors were legally selected and summoned before the case was called for trial, or not. (*State v. Taylor*, 36 K. 329.)

746. And in such prosecution, where the trial court permitted the testimony of the defendant taken at the coroner's inquest, and reduced to writing and signed by the defendant, to be read in evidence on the trial on behalf of the state, and permitted this to be done although the defendant did not testify on the trial; and, from anything appearing in the case, this testimony was given voluntarily; and the defendant objected and excepted to its introduction, but without giving any reason for his objection or exception: *Held*, That the court did not err in permitting this testimony to be introduced. (*State v. Taylor*, 36 K. 329.)

747. And where the court permitted the paper containing this testimony to be taken by the jury to their room to be considered by them while deliberating upon their verdict, but at the time when the court permitted this to be done it announced in open court and in the presence of the defendant and his counsel that the court would so permit the same to be done, and no objection was made, *held*, that no material error was committed. (*State v. Taylor*, 36 K. 329.)

748. And in such prosecution, where the court permitted the written testimony, taken on the preliminary examination of the defendant, from a witness who at the time of the trial was alive and within the jurisdiction of the court, to be read in evidence on the trial, but there is no showing what the testimony was, or that it was in any degree prejudicial to the substantial rights of the defendant, *held*, that the court erred in permitting the testimony to be read in evidence, but that the supreme court cannot say that the error was material. (*State v. Taylor*, 36 K. 329.)

749. And in such prosecution, and during the trial, the court permitted the names of seventeen additional witnesses to be indorsed upon the information, and permitted such witnesses to testify; but there is no showing as to what their testimony was, or that it was prejudicial to the rights of the defendant: *Held*, That the supreme court cannot say that the trial court abused its discretion in permitting said names to be indorsed upon the

information, or in permitting the witnesses to testify. (*State v. Taylor*, 36 K. 329.)

750. In a criminal prosecution the only way to make the testimony or statements of jurors on their *voir dire*, or the testimony of witnesses introduced on the trial, a part of the record, whether the testimony and statements are taken by a stenographic reporter or not, is to embody such testimony or statements in a bill of exceptions allowed and signed by the judge of the trial court. (*State v. McClintock*, 37 K. 40.)

751. And in such prosecution, instructions asked for by the defendant and refused by the trial court cannot become a part of the record, unless they are embodied in a bill of exceptions. (*State v. McClintock*, 37 K. 40.)

752. The defendant interposed the defense of insanity to the charge of murder in the first degree, and on the trial the court charged substantially that the test of the defendant's responsibility was, whether at the time of the homicide he had capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he was doing, and had power to know that the act was wrong and criminal, and would subject him to punishment. *Held*, That it was a proper instruction; and *further held*, that the omission to charge that if the defendant knew the act to be wrong, but was driven to it by an irresistible impulse arising from an insane delusion, he would not be responsible, was not error. (*State v. Mowry*, 37 K. 369.)

753. Voluntary intoxication is no excuse for crime, and can only be considered in cases involving the condition of the defendant's mind when the act was done. On a charge of murder the drunkenness of the defendant may be considered with a view of determining whether there was that deliberation, premeditation, and intent to kill, necessary to constitute the offense. (*State v. Mowry*, 37 K. 369.)

754. A private person may, in a temperate manner and without a warrant, arrest one who has just committed a felony; and it is murder for the person so attempted to be arrested to

kill one whom he knows is in fresh pursuit and endeavoring to arrest him for such felony. (*State v. Mowry*, 37 K. 369.)

755. Where a person has been apprehended in the commission of a felony, or in fresh pursuit, notice of the crime and the purpose of pursuit, by one endeavoring to arrest him for such crime, is not necessary. (*State v. Mowry*, 37 K. 369.)

756. Instructions upon an offense inferior in degree and included in the one charged should not be given, unless there is some evidence tending to show that the defendant is guilty of such offense. The verdict held to be sustained by the evidence. (*State v. Mowry*, 37 K. 369.)

757. A bill of exceptions which is not presented, allowed, signed and filed until after the final adjournment of the term of the court at which the trial was had, cannot be regarded as a part of the record. (*State v. Smith*, 38 K. 194.)

758. It is generally the duty of the court, upon proper application, to continue the term a sufficient length of time to afford parties whose cases are tried near to the close of the term, a reasonable opportunity to prepare and present a bill of exceptions; but a refusal to do so cannot be corrected upon appeal. (*State v. Smith*, 38 K. 194.)

759. The charge of the court in a criminal cause only becomes a part of the record by means of a bill of exceptions. (*State v. Smith*, 38 K. 194.)

760. An information which, after alleging time and place, states that the defendant feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, assaulted, struck, stabbed and cut H. with a knife, inflicting a mortal wound, from which H. died, and then concludes by charging that the defendant, in the manner and form aforesaid, did feloniously, willfully, deliberately, premeditatedly, and of malice aforethought, kill and murder H., sufficiently charges an intentional murder. (*State v. Smith*, 38 K. 194.)

761. The verification of an information and the jurat attached were in the following form: "STATE OF KANSAS, DAVIS COUNTY, ss.: On this 12th day of March, 1887, personally came

H. J. Humphrey, county attorney of said county, who being duly sworn according to law, deposes and says that the facts set forth in the foregoing information are true, to the best of his knowledge, information, and belief.—H. J. HUMPHREY.” “Sworn to and subscribed in my presence, the day and year last above written.—J. B. CALLEN, *Clerk of the Court.*” *Held*, That the irregularity of the certifying officer in omitting from the jurat the words “before me,” after the words “sworn to,” is not fatal to the information. (*State v. Smith*, 38 K. 194.)

762. Upon a trial for murder in the first degree, the court in its instructions to the jury made malice aforethought an essential ingredient in murder of the second degree; and instead of defining malice aforethought as “such a depraved condition of mind as shows a total disregard of social duty, and a heart bent wholly on evil,” or as a “wicked purpose, or intention,” incorporated in its definition some words making malice a condition of mind showing the existence of a premeditated and deliberately formed design, on the part of the slayer, to do the killing. The court further charged the jury, however, that “murder in the second degree is the unlawful killing of another, purposely and of malice aforethought, but without deliberation and premeditation.” The jury found the defendant guilty of murder in the first degree. *Held*, That the giving of a too strong definition of malice in the instruction of murder in the second degree was an error on the side of mercy, and not prejudicial to the defendant. (*State v. Furborough*, 39 K. 581.)

763. Where severe blows or other personal violence have been intentionally inflicted upon the defendant, and soon after he takes the life of the aggressor, the question whether a reasonable time had elapsed for his passions to cool and his reason to resume its control, is one of fact for the jury. The length of time necessary for cooling has never been made absolute by rule; it must, in the nature of things, depend much on what is special to the particular case. The time in which an ordinary man, under like circumstances, would cool, is generally a reasonable time. *Held*, In this case, however, so much time—

about two hours—intervened between the quarrel of the deceased with the defendant and the killing; and so much thought, contrivance and design were betrayed by the defendant in the mode of possessing himself of the revolver with which he killed the deceased, and so much deliberation and express malice on the part of the defendant was established, that in view of the finding of the jury that the defendant was guilty of murder in the first degree, the trial court committed no error prejudicial to the defendant in failing to instruct the jury as to the several degrees of manslaughter. (*State v. Farborough*, 39 K. 581.)

764. The defendant was arrested upon a coroner's warrant, of which the following is a copy: "CORONER'S WARRANT.—STATE OF KANSAS, JOHNSON COUNTY, SS.—*To the Sheriff of Johnson County, Kansas:* WHEREAS, A coroner's jury, duly summoned and sworn to determine the cause of the death of J. D. Tennison, held on June 27th, A. D. 1887, and on July 11th, 1887, returned a verdict thereon on July 11th, 1887, that the said J. D. Tennison came to his death by means of poisoning, being arsenic feloniously administered, as they, the said jurors, believe, by Mrs. J. D. Tennison, and others to said jurors unknown; this, therefore, is to command you forthwith to arrest the said Mrs. J. D. Tennison and take her before some justice of the peace in said county, then and there to answer to the charge of feloniously administering the said poison, and causing the death of the said J. D. Tennison. In witness whereof, I have hereunto set my hand, this July 11, 1887.—DR. THOMAS HAMILL, Coroner." She submitted to a preliminary examination upon the warrant, without questioning the sufficiency of the charge therein contained, and after the information was filed sought to have the prosecution abated because the warrant was void, and that therefore no legal preliminary examination had been awarded. *Held*, That although the charge stated in the warrant is not as full and precise as it should have been, it was too late to challenge its sufficiency after the preliminary examination was concluded and the defendant bound over for trial. (*State v. Tennison*, 39 K. 726.)

765. A general finding made by the magistrate that there is sufficient evidence to warrant the binding over of the defendant, and a recitation in the commitment issued that it appears that the offense of murder has been committed, and that there is probable cause to believe that the defendant is guilty of the commission thereof, is a sufficient compliance with § 54 of the criminal code. (*State v. Tennison*, 39 K. 726.)

766. A plea in abatement should not be sustained because of an indefinite description of the offense in the warrant, when it appears as in this case, that the warrant and testimony taken in the preliminary examination together show that the defendant could and did know the nature and the character of the offense with which she was charged. (*State v. Tennison*, 39 K. 726.)

767. A juror on his *voir dire* testified that he had neither formed nor expressed any opinion, and was without bias or prejudice, and was accepted as a juror, and served. On a motion for a new trial, two witnesses testified that, on the morning after the killing the juror had said in their presence and hearing, on being told of it, speaking of the defendant: "He has killed his man at last, has he?" "This is not the first crime of that kind that he has been guilty of." "He is a bad man, a desperate man, and they ought to hang him or do something with him, not to put the county to any expense." On reexamination the juror at first denied having made such statements, but on cross examination he said he had no recollection of making any such statement, and finally said he had no recollection of what was said at the time the witnesses referred to, but admitted being present, as stated by them. He also said that he had heard all kinds of stories about the killing, and that on the evening of the funeral of the deceased he was present at a conversation, in which it was stated that the defendant had killed other men. Part of the evidence on the motion for a new trial was oral, and part in affidavit. The trial judge overruled the motion, and sustained the qualification of the juror. *Held*, That as the questions involved in this

case are purely of fact, and as on the whole record a reasonable doubt of the defendant's guilt might be entertained, the trial judge ought to have sustained the motion for a new trial. The case of *The State v. Bancroft*, 22 K. 170, cited, and distinguished. (*State v. Cleary*, 40 K. 287.)

768. Before a witness can be impeached by proof of contradictory statements made in his evidence on a former trial, such contradictions must be called to his attention; and it is error to introduce them without having laid any foundation. (*State v. Cleary*, 40 K. 287.)

769. The better practice in criminal cases is to subdivide the charge of the court to the jury, devoting one instruction to each particular subject, and to consecutively number them. (*State v. Cleary*, 40 K. 287.)

770. Where an information contains allegations sufficient to constitute the crime charged, such information must, on motion to quash, be held sufficient, although it contains repetitions, surplusage and redundant allegations. (*State v. Furney*, 41 K. 115.)

771. It is largely in the discretion of the trial court to allow the preliminary proof to the introduction of death-bed statements of deceased to be given to the court in the presence of the jury, but good practice would suggest that such proofs be made in the absence of the jury, when properly insisted upon. (*State v. Furney*, 41 K. 115.)

772. Statements not under oath can only be admitted in evidence as dying declarations when they are made *in extremis*, and where the death of the person who made the declaration is the subject of the charge, and where the circumstances of the death are the subject of the declarations, and the person making them is in the full belief that he is about to die, and this condition of mind must be made clearly to appear. (*State v. Medlicott*, 9 K. 257; *State v. Furney*, 41 K. 115.)

773. Where incompetent testimony is given to the jury, such error is cured where the defendants on their own behalf testify

substantially to the same facts, erroneously admitted in the first instance. (*State v. Furney*, 41 K. 115.)

774. Where persons combine to commit a crime, and while so engaged in such unlawful act murder is committed by one or more of the conspirators, without the knowledge or consent of the others, and the act is not the natural or probable outcome of the common design and purpose, but the independent act of one or more of the conspirators; *held*, those not participating in it are not guilty of murder. (*State v. Furney*, 41 K. 115.)

775. Where circumstantial evidence constituting a single chain is relied upon by the state for a conviction; each essential fact in the chain of circumstances must be found to be true by the jury beyond a reasonable doubt, to warrant a conviction. (*State v. Furney*, 41 K. 115.)

776. The provisions of the civil code, providing for bringing civil cases to the supreme court for review upon a "case made," do not apply to appeals to the supreme court from judgments in criminal actions. To enable the supreme court to review a decision of the trial court upon an appeal in a criminal action, a transcript, properly certified, must be filed in the court within the time prescribed by the statute. (*State v. Furney*, 40 K. 17.)

777. It is not error in a criminal case for the court to permit a slight amendment to be made to the verification of the information. (*State v. Gould*, 40 K. 258.)

778. In a criminal case where the charge is sufficient, and where it was unquestionably established on the trial and not denied that the defendant was guilty of the offense charged against him unless he was insane at the time, the only material questions to be considered on appeal to the supreme court are such as relate in some manner to the defendant's sanity or insanity. (*State v. Gould*, 40 K. 258.)

779. Where the district court has jurisdiction of a criminal case, its jurisdiction to try such case cannot be taken away by the commencement of proceedings in the probate court for the

purpose of having the question determined whether the defendant was sane or insane. (*State v. Gould*, 40 K. 258.)

780. In a criminal case where it is claimed that the defendant was insane at the time of the commission of the alleged offense, and still insane, the question of the defendant's sanity or insanity may be tried along with all the other questions in the case. (*State v. Gould*, 40 K. 258.)

781. Where a defendant in a criminal case has exercised only slight diligence to procure the attendance of a witness to prove an unimportant fact relating to the defendant's conduct on a particular day, and this for the purpose of proving alleged insanity, and where numerous other witnesses could easily be obtained to prove the defendant's conduct for many years. *held*, that the trial court did not err in overruling an application for a continuance on account of the absence of said witness. (*State v. Gould*, 40 K. 258.)

782. *Held*, That the trial court did not commit material error under the circumstances of the case in overruling the defendant's challenge for cause of certain persons who were being examined upon their *voir dire* to serve as jurors. (*State v. Gould*, 40 K. 258.)

783. Also *held*, that the trial court did not err in admitting the testimony of certain physicians and surgeons. (*State v. Gould*, 40 K. 258.)

784. Where it is claimed that there was misconduct on the part of one or more jurors, a new trial should not be granted where it is unquestionably shown that such supposed misconduct did not prejudice any of the substantial rights of the defendant. (*State v. Gould*, 40 K. 258.)

785. W. was shot and instantly killed by J.; there were but two witnesses to the homicide; one, the defendant, who claimed he acted in self defense, testified he was only seven or eight feet from W. when he discharged the musket; the other a ten-year-old son of W., said the defendant was more than seventy feet distant. From the wound causing the death of W., it appeared that the shot entered his body within a space of two

inches in diameter, except three or four just outside of such space. At the trial, the defendant produced a witness who said he was and had been a gunsmith for thirty years; that he had studied and experimented for years to ascertain how far guns and muskets would carry shot compactly, and that he was able to state how far from the musket used, a person receiving such a wound as deceased would have been. *Held*, The witness was qualified as an expert, and the evidence sought to be introduced was competent and material. (JOHNSTON, J., dissenting.) (*State v. Jones*, 41 K. 309.)

HORSE STEALING.

786. Under the laws of Kansas providing that "every person who shall be convicted of feloniously stealing, taking, and carrying away . . . any horse, mare, gelding, colt, filly, . . . shall be deemed guilty of grand larceny," (Comp. Laws 1879, p. 337, § 78.) evidence showing the larceny of a *gelding* will not sustain a charge for stealing a *horse*. (*State v. Buckles*, 26 K. 237.)

787. One requisite of an indictment, under § 95 of the criminal code (Comp. Laws, 251), is that it be found by the grand jury of the county where the court is held. The law of 1864 (§ 4, p. 112) applies this provision to prosecution on information, as far as may be, and also provides that the information shall be presented by the prosecuting attorney of the county, as informant, who shall subscribe his name hereto. To receive evidence without such an information, *held*, error. (*Jackson v. State*, 4 K. 150.)

788. A paper, in form of an affidavit of the prosecuting witness, signed as prosecutor, and sworn to by him, without the prosecuting attorney's name appearing, *held*, not to be an information. The signing of the paper by the prosecuting attorney, by permission of the court, after the trial commenced, does not cure the error. (*Jackson v. State*, 4 K. 150.)

789. *Seemle*, A trial under such a paper could not be plead in bar of another charge of the same offense. (*Jackson v. State*, 4 K. 150.)

790. The defendant, raising the question for the first time, by objecting to the introduction of evidence thereunder, took the first legal occasion for presenting his objection. (*Jackson v. State*, 4 K. 150.)

ILLCIT INTERCOURSE—SEDUCTION.

791. Where an information under § 36, ch. 31, Comp. Laws of 1879, charges that on November 3, 1884, in the county of Smith and state of Kansas, one B., a male person, did then and there unlawfully and feloniously obtain illicit connection with one K., she, the said K., then and there being a female person of good repute, of the age of only seventeen years, and the said B. did then and there obtain such illicit connection with the said K. aforesaid, at the time and place aforesaid, under a promise of marriage then and there made by him, the said B., to her the said K., *held*, that the information sufficiently charges that the prosecutrix was of good repute at the time of the marriage contract, and that the marriage contract was the moving cause or consideration for the illicit connection; and also, *held*, that the omission to state in the information more specifically that the prosecutrix was a single woman, or the defendant a single man, at the time of the promise of marriage, is not necessarily fatal thereto. (*State v. Bryan*, 34 K. 63.)

792. Upon the trial of a defendant for the offense charged in § 36, ch. 31, Comp. Laws of 1879, it is not competent for the defendant to prove particular acts of unchastity, or specific acts of illicit intercourse, by the prosecutrix with other persons. "It is the reputation and the age of the female, and not her previous conduct, that bring her within the protection of the statute." (*Bowers v. State*, 29 Ohio St. 542.) (*State v. Bryan*, 34 K. 63.)

793. Where the prosecutrix has recently lived in the neigh-

borhood of the witness, which is about five miles from her own home, and is generally acquainted in that neighborhood, and such witness knows the general reputation of the prosecutrix for chastity in such neighborhood, but does not know her general reputation for chastity in the particular neighborhood in which she resides at the time of the trial, such witness may be permitted to give evidence of her general reputation for chastity in his neighborhood. The means and extent of the witness' knowledge, under the circumstances, are matters which affect the credibility, but not necessarily the competency of the witness. (*State v. Bryan*, 34 K. 63.)

794. A woman's reputation for chastity is what the people of her acquaintance generally say of her in this regard; that is, the general credit for chastity which she bears among her neighbors and acquaintances. If a woman's neighbors and acquaintances say nothing of her, or do not question her character for chastity, then her reputation in this respect should be considered good. The best character is generally that which is least talked about; therefore, the negative evidence of a witness "that he never heard anything against the character of the woman for chastity, in whose behalf he has been called, that is, that he never heard her conduct criticised, condemned or even talked about," is admissible upon the trial, where the reputation of the woman for chastity is in question, and is strong evidence of the woman's good repute. (*State v. Bryan*, 34 K. 63.)

IMPEACHMENT.

795. By constitutional provision, all impeachments are to be tried by the senate, the senators when sitting for that purpose being sworn, and a concurrence of two-thirds of those elected being necessary to a conviction, but as to when the senate shall sit for the purpose or how the trial shall be conducted, the constitution is silent. (*State ex rel. v. Hillyer*, 2 K. 17.)

796. In the absence of express provision, the common law

"will regulate, interpret and control the powers and duties of the court of impeachment." *Semble*, this common law rule is applicable only to the trial and proceedings, *held*, not applicable in determining questions relating to the organization of the court the body that prefers as well as that which tries the charges being unknown to the common law and dissimilar to the British parliament. Distinction as to impeachment pointed out. (*State ex rel. v. Hilleyer*, 2 K. 18.)

797. The independent jurisdiction of the senate of Kansas as a court of impeachment maintained and *held* that there is no usage or right of attendance on a trial of impeachment by the house of representatives. (*State ex rel. v. Hilleyer*, 2 K. 17.)

798. By express provision of law the senate, with the consent of the house, when organized and sitting as a court of impeachment, may adjourn to any period during their term of office not beyond the next regular meeting of the legislature, whether the house be in session or not at such time, and if it confines its acts within its duties as an independent body, they will be valid. It was competent for our legislature to pass a law authorizing such action. (*State ex rel. v. Hilleyer*, 2 K. 17.)

799. The passage of the resolution of the house asking the senate to set the trial for a certain day, and the adjournment of the senate sitting as a court to that day, *held* an assent of the house to such adjournment, and within the meaning of the constitution; and the passage afterwards of the concurrent resolution adjourning the legislature *sine die*, was with reference to the law and the previous adjournment of the senate sitting as a court, and the meeting of such court was not in conflict with it. (*State ex rel. v. Hilleyer*, 2 K. 17.)

800. The different resolutions of each branch of the legislature and acts of both, relating to the same subject matter are to be taken together. (*State ex rel. v. Hilleyer*, 2 K. 17.)

801. There is no constitutional inhibition of the session of one branch of the legislature when the other is not in session; and, *semble*, the separate action of one body may be valid in the absence or non-organization of the other. Constitutional

provisions and limitations relating to the meeting and adjournment of the house of the legislature, pointed out. (*State ex rel. v. Hillyer*, 2 K. 17.)

INDICTMENT.

802. Indictment found in Jefferson county, signed "A. S., County Attorney of Jackson county." Defendant moved to quash on ground involving that discrepancy. The record showed that defendant admitted in open court on the argument of the motion, that A. S. was, in fact, at the time of the filing of the indictment, county attorney of Jefferson county. *Held* that it was error for the court below to grant the motion to quash. (*State v. Tannahill*, 4 K. 117.)

INFORMATION.

803. A county attorney may file an information in vacation for a misdemeanor cognizable before a justice of the peace, and of which the district court also has jurisdiction. (*In re Eddy*, 40 K. 592.)

804. Secs. 1 and 2, of ch. 178 of the Session Laws of 1887, construed. (*In re Eddy*, 40 K. 592.)

805. It is the duty of the clerk of the court to issue a warrant upon an information filed in vacation, naming therein the offense and the county where it was committed, and requiring the officer to bring the accused before the judge or clerk to be admitted to bail; but when the clerk, at the time the warrant was issued, indorsed thereon that the judge was absent from the county, and fixed the amount of bail required, it was a mere irregularity of the clerk of which the accused cannot complain. (*In re Eddy*, 40 K. 592.)

JAIL.

806. Chapter 74, of the Laws of 1886, "An act authorizing and directing the county commissioners of Shawnee county to levy an assessment to build a jail and jailer's residence," approved February 4, 1886, is constitutional and valid. (*Washburn v. Shawnee Co.*, 37 K. 217.)

807. A county is not liable to the inmates of its county jail for negligently permitting such jail to become and remain in such a bad condition that the inmates thereof become sick and diseased. (*Pfefferle v. Lyon Co.*, 39 K. 432.)

808. Where a person is confined in a city prison, upon a conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by such person by reason of the bad character of the prison, or the negligence of the officer in charge of the same. (*La Olef v. City of Concordia*, 41 K. 323.)

JURISDICTION, JUSTICES.

809. A justice of the peace has no power to hold his court for the final trial of parties charged with criminal offenses outside the limits of the township of which he is justice, and where he assumes to so act his proceedings are without jurisdiction, and void. (*Phillips v. Thralls*, 26 K. 780.)

810. Neither the consent nor the request of a defendant can give to a justice of the peace jurisdiction to hold his court outside the limits of his township. (*Phillips v. Thralls*, 26 K. 780.)

JURISDICTION, DISTRICT COURT.

811. In a criminal prosecution where the court has jurisdiction of the defendant only by means of the service of process in this state procured by the illegal arrest of the defendant in another state, *held*, that the court has no such jurisdiction as will properly authorize it to render judgment in the case against the defendant. (*State v. Simmons*, 39 K. 262.)

LARCENY.

812. Judgment will not be arrested where the indictment shows that the court had jurisdiction, and the facts stated constitute a public offense. (*Wessells v. Territory*, McC. 100.)

813. The words "steers" and "working cattle" are synonymous, and designate one and the same thing, to wit: cattle that have worked. (*Wessells v. Territory*, McC. 100.)

814. The letter of art. 2, § 8, clause 17, of the constitution of the United States does not preclude the exercise of jurisdiction by the state of Kansas, over criminal offenses committed on the military reservation of Fort Leavenworth, because—(1) that reservation was not purchased with consent of the state legislature; and (2) it was not purchased for the erection of forts, but as a part of the vast territory of Louisiana; and the state may exercise such jurisdiction. (*Clay v. State*, 4 K. 49.)

815. Congress has not reserved its control over the military reservation at Fort Leavenworth; the omission in the act of admission of Kansas, to take guaranties against the action of the state in exercising such jurisdiction, is conclusive. (§1, Act of Admission.) (*Clay v. State*, 4 K. 49.)

816. The legislature did not transcend its authority in providing (§ 274, Comp. Laws, 340) against bringing stolen property into the state. That section makes the retaining, within this state, of the possession of property stolen without, equivalent to an original act of theft; regards every asportation *animo furandi* as a new taking, and punishes it accordingly. *Semble*. This is the common law doctrine. (*McFarland v. State*, 4 K. 68.)

817. In such case, *held*, that under said section (Comp. Laws, 341) the larceny may be charged to have been committed, and may be indicted and punished, in any county into or through which such property shall have been brought. It is competent, in such a case, to examine witnesses as to the original taking in another state. (*McFarland v. State*, 4 K. 68.)

818. *Generally*, the evidence in a case must be confined to the point in issue; but where it is referable to the point in issue, it will not be inadmissible, though incidentally applicable to another person or thing not included in the transaction in question; and this, to prove a *scienter*, to make out the *res gestæ*, or to exhibit a chain of circumstances. Under this rule, *held*, that it was not error, in an action for larceny brought against appellant and three other persons, in the taking of property found in the possession of the four, for the court below to admit evidence, showing that the four squatted on the premises together—together cut hay, and built unusual and hollow stacks (in one of which the property in question was found), the relationship of the four, their manner of life, the varied kinds of articles identified as the property of different persons, living in different directions, found secreted in the cavities in the stacks, and in various places on the premises, and that the three escaped before trial—this evidence all tending to show a chain of circumstances pointing to the guilt of appellant, if not as principal, as an accessory before the fact, in which case he would be equally guilty. (Comp. Laws, 252, § 101; p. 341, § 276; *Lewis v. State*, 4 K. 296.)

819. Where the guard of the prisoners, a witness for defendant, testified that the defendant refused to escape with the others, and that he had the same facilities, and on cross examination, when asked if he did not, at a certain time and place, tell the sheriff that at the time of the escape defendant was sick, and could not get out, and witness answered that he did not remember, and, where the sheriff was sworn for the state, *held*, that it was competent for him to testify that on the occasion named, witness did tell him that defendant was sick at the time of the escape, and could not run. (2 Phil. Ev. 435; 1 Green Ev. 606.) (*Lewis v. State*, 4 K. 296.)

820. If the prosecution, in a criminal case, rests its case on the possession of the fruits of crime *alone*, then the possession should be absolute and exclusive where one alone is charged with the offense; but where others are jointly charged, and

other circumstances are proved, proof of joint possession may be sufficient as one of many items of testimony, and it is not error so to charge. (*Lewis v. State*, 4 K. 296.)

821. It is proper for the court below to refuse an instruction, though it is law, when not applicable to the facts proved, and to substitute an instruction that does apply. (*Lewis v. State*, 4 K. 296.)

822. The law does not prohibit a separation of the jury, with proper admonition by the court, *before* the case is submitted to them, and such separation is not error. (*Lewis v. State*, 4 K. 296.)

823. Where an affidavit for a continuance on the ground of absent witnesses is filed by the defendant in a criminal case, and the prosecutor for the state consents that the same shall be read in evidence as the statement and testimony of such absent witnesses, it is proper for the district court, or for the criminal court, as in this case, under the provisions of rule 14 of the supreme court to refuse the application and direct the trial to proceed. (*Thompson v. State*, 5 K. 159.)

824. It is error for the court to quash a criminal information charging larceny "for the reason that the said information was not preferred or filed at the first term of said court after the defendants' arrest, and at which they personally appeared as required by law." (*State v. Baird*, 10 K. 58.)

825. Where an information charges the larceny of the property of Michael Wandler, evidence that the property belonged to J. M. Wandler, will not sustain a verdict against the defendant. (*State v. Taylor*, 15 K. 420.)

826. Nor in such a case will the fact that, on the opening of the trial the county attorney called Michael Wandler, and thereupon a witness answered, took the stand, was sworn, and testified that his name was J. M. Wandler, and that he owned the property, sustain a finding that Michael Wandler and J. M. Wandler were one and the same person. (*State v. Taylor*, 15 K. 420.)

827. Before a court is justified in sustaining an application

for a change of venue on account of the prejudice of the inhabitants of the county, it must affirmatively appear from the showing that there is such a feeling and prejudice pervading the community as will be reasonably certain to prevent a fair and impartial trial. (*State v. Furbeck*, 29 K. 532.)

828. Although the trial court may err in overruling a question propounded to a juror upon his *voir dire*, yet the error will not be sufficient to justify a reversal of the judgment when the record fails to show that the defendant challenged the juror either for cause or peremptorily, or that the defendant made any peremptory challenges. (*State v. Furbeck*, 29 K. 532.)

829. Where improper testimony is admitted and no exception taken thereto, and thereafter on motion of the defendant the jury are instructed to disregard all such testimony, *held*, that no sufficient ground is laid for setting aside the judgment. (*State v. Furbeck*, 29 K. 532.)

830. It is a matter resting largely within the discretion of the trial court, whether pending the trial it will delay the proceedings for the purpose of enabling the defendant to bring in additional testimony. And *held*, that in this case it cannot be said that the court abused its discretion. (*State v. Furbeck*, 29 K. 532.)

831. Where a defendant is charged with grand larceny, and the testimony does not affirmatively and clearly show beyond dispute that the property charged to have been stolen was or was not of the value of \$20 or over, the mere fact that eleven of the jury at first voted the defendant guilty of grand larceny, while one voted not guilty and said that he believed the defendant innocent of any crime, but afterward concurred with the rest in a verdict of guilty of petit larceny, does not justify this court in setting aside the judgment pronounced by the trial court upon such verdict. (*State v. Furbeck*, 29 K. 532.)

832. Costs of the prosecution were adjudged against the prosecuting witness, who appeals. Affirmed on *State v. Zimmerman*, ante, 31 K. 85. See also *State v. Spencer*, 81 N. C. 519; *State v. Adams*, id. 560. (*State v. Forney*, 31 K. 635.)

833. An information for larceny, where the only description of the property stolen is "national bank notes, United States treasury notes, and United States silver certificates, money of the amount and value of one thousand dollars," without any allegation of the inability of the prosecutor to give a more specific description, is insufficient, and will be held bad on an objection seasonably made. (*State v. Tilney*, 38 K. 714.)

834. The verification of an information by a prosecuting attorney upon information and belief, is sufficient. (*State v. Montgomery*, 8 K. 351.)

835. Where a party obtains from the court the specific order for which he applies, he has, ordinarily, no cause for complaint, even though the court formally overrules his application, and then upon his own motion directs the order to be made. (*State v. Montgomery*, 8 K. 351.)

836. The district court can adjourn the term in one county to a day subsequent to that fixed by law for the commencement of the regular term in another county of the same district. (*State v. Montgomery*, 8 K. 351.)

837. Declarations to be admissible as a part of the *res gestæ* must be contemporaneous with some principal fact which they serve to explain or qualify. (*State v. Montgomery*, 8 K. 351.)

838. Testimony is admissible that tends directly to prove the defendant guilty of the crime charged, although it may also tend to prove a distinct felony, and thus prejudice the accused. (*State v. Fohrwell*, 14 K. 105.)

839. It is a general rule that witnesses (not experts) are not allowed to give their opinions to a jury, but there are many exceptions; and where, as in this case, the witness knew and had examined the wagon of the defendant, observed the peculiarities of its running gear, and had followed certain wagon tracks, had measured them, and had noted many minute circumstances tending strongly to show that the tracks were made by defendant's wagon, it was not error for the court to refuse to rule out a statement of the witness, a part of which was, that

in the opinion of the witness defendant's wagon made the tracks. (*State v. Folwell*, 14 K. 105.)

840. Where the record does not show that the bill of exceptions contains all the evidence, this court cannot say, in the absence of any showing, that there was not evidence produced to the court that declarations made by the accused, while in custody, were voluntarily made. (*State v. Folwell*, 14 K. 105.)

841. Where an instruction is asked, that if a particular witness, naming him, has testified falsely, etc., the jury should disregard his entire testimony, it is not error for the court to refuse such instruction and substitute one that if *any witness* testified falsely, etc. (*State v. Kellerman*, 14 K. 135.)

842. Where the court properly instructs the jury that in order to convict they must be satisfied from the evidence "that the defendant stole, took and carried away" the property alleged to have been stolen, it is not error to refuse a specific instruction that "*taking* is a material part of larceny, and must be established by competent evidence." (*State v. Kellerman*, 14 K. 135.)

843. Where the principal witness for the state is an accomplice, it is not error to refuse an instruction that such accomplice "stands before the jury in the character of an impeached witness, and as such his testimony requires confirmation," when the jury have been instructed that "in determining the weight and credit to be given such testimony the jury should use great caution, and unless the testimony of the witness is corroborated by other evidence in some material point in issue, the defendant should be acquitted, as it would be unsafe to convict upon the sole and uncorroborated testimony of an accomplice." (*State v. Kellerman*, 14 K. 135.)

844. Where the larceny charged was the larceny of a horse, and the owner testified that the horse was taken out of his pasture during the night time, and the accomplice testified that an arrangement was made between the defendant and himself for stealing and selling a horse, and in pursuance thereof, on the night that this horse was taken out of the pasture it was

brought by defendant to witness and by him taken to a neighboring town and sold, and produced a writing admitted by defendant to have been written and signed by himself, certifying that the witness was "duly authorized to sell" this horse, described in the writing as "my horse", *held*, that this writing was "sufficient corroboratory testimony to sustain a verdict of guilty. (*State v. Kellerman*, 14 K. 135.)

845. Where a motion for a new trial is made on the ground of newly discovered evidence, it is as a general rule essential that the affidavits of the newly discovered witnesses should be produced or their absence accounted for; and it is also as a general rule true, that the unsupported affidavit of the defendant or his counsel will not be sufficient. (*State v. Kellerman*, 14 K. 135.)

846. An information in a criminal action, signed and filed by the proper prosecuting officer, who describes himself in such information as "prosecuting attorney," and not as "county attorney," will be held sufficient, if it is in all other respects sufficient. (*State v. Tannahill*, 4 K. 117; *State v. Nulff*, 15 K. 404.)

847. The verification of an information by a prosecuting attorney, upon information and belief, is sufficient. (*State v. Montgomery*, 8 K. 351; *State v. Nulff*, 15 K. 404.)

848. A *nolle prosequi* of a criminal prosecution entered before the commencement of a trial is no bar to a subsequent prosecution for the same offense. (*State v. Ingram*, 16 K. 14.)

849. A plea to an indictment of *autrefois acquit*, which simply alleges a *nolle prosequi*, is bad, and a demurrer to it should be sustained. (*State v. Ingram*, 16 K. 14.)

850. Where a demurrer to such a plea is however overruled, and then a denial filed, and the court on the trial of such plea refuses to call a jury, but hears the testimony and decides against the plea, and the testimony only shows a *nolle prosequi* before trial, *held*, that the substantial rights of the defendant were not prejudiced. (*State v. Ingram*, 16 K. 14.)

851. Where testimony is admitted without objection, it is too

late to insist for the first time in this court that it was admitted without first laying the proper foundation therefor. (*State v. Ingram*, 16 K. 14.)

852. It is not error to admit in evidence the admissions and confessions of the defendant, although made after his arrest, and while in custody, and although at the time a crowd of persons was surrounding the building in which he was confined, provided it appears that such confessions and admissions were made without, and were uninfluenced by, any threats, promises, or other inducements. (*State v. Ingram*, 16 K. 14.)

853. On the trial of a prosecution for the larceny of a horse, which rests largely upon circumstantial evidence, it is not error to admit the evidence of certain witnesses who testify to seeing the defendant, recently after the larceny, in the possession of a horse, without fully identifying it as the horse that was stolen. The weight of such testimony is matter for the consideration of the jury. (*State v. Ingram*, 16 K. 14.)

854. Where the court, at the instance of the state, instructs the jury as to the right to convict upon circumstantial testimony, and thereafter gives all the instructions asked by the defendant in respect to such evidence, the latter has no cause of complaint that the first instruction failed to give any rules for weighing and determining the effect of circumstantial testimony, or to suggest the need of extra caution respecting such testimony. (*State v. Ingram*, 16 K. 14.)

855. Where upon the whole testimony the state has made out a *prima facie* case, that is, has proven such a state of facts, as unexplained, point to the defendant's guilt, and no explanations have been made, the jury is warranted in finding a verdict of guilty. The mere presumption of innocence does not overthrow the presumption from the unexplained facts. (*State v. Ingram*, 16 K. 14.)

856. The jury is not bound to believe all the statements made by the defendant in explanation of his possession of recently stolen property, those in favor as well as those against him, even though there is no direct evidence showing the falsity

of the former. They are to consider all the statements, and give to each such credence as to them seems reasonable and just under all the circumstances of the case. (*State v. Ingram*, 16 K. 14.)

857. An instruction which, though correct as an abstract proposition, seems likely without some explanation or qualification to mislead the jury, may properly be refused. (*State v. Ingram*, 16 K. 14.)

858. An instruction in a criminal case, that, "where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature, is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure it, the jury may properly take such facts into consideration in determining the prisoner's guilt or innocence; but no inference of guilt is to be drawn from the omission of the defendant and his wife to testify"—is not erroneous; and if applicable to the facts in the case furnishes no ground of reversal. (*State v. Grebe*, 17 K. 458.)

859. On the trial of a party charged with the larceny of a large sum of money, and in which the evidence is mainly circumstantial, evidence that prior to the larceny the defendant's family were in very straitened circumstances, and that subsequently it displayed considerable means, and evidence that subsequently to the larceny a creditor in seeking to collect his claim charged him in the presence of several witnesses with having had and used considerable sums of money, and with having lost many dollars in gambling, and referred him to the records of the county and the bystanders for proof of such charges, and that defendant in reply thereto denied none of such charges, except that he had lost any amount of money in gambling, is competent to go to the jury. (*State v. Grebe*, 17 K. 458.)

860. Upon examination of the testimony in this case, it is *held*, that the judgment cannot be set aside in this court on the ground that the verdict is against the evidence. (*State v. Grebe*, 17 K. 458.)

861. An objection, to be available, should run to the specific

testimony alone which is objectionable; and where it runs to testimony some of which is competent, and some incompetent, an overruling of the objection will seldom, if ever, be adjudged error. (*State v. Cole*, 22 K. 474.)

862. While declarations of an accomplice, made after the consummation of a crime, as to the manner of its commission, are hearsay and inadmissible, yet it is competent to show his acts, with accompanying and qualifying statements, pending and in aid of the commission of the offense, or in disclosing the place and person where and upon whom the offense was committed. (*State v. Cole*, 22 K. 474.)

863. While continuances are largely within the discretion of the trial court, yet when defendant, at the term at which the information is filed, shows by his affidavit that there is material testimony which he has been unable to procure, and that he has used reasonable diligence since his arrest to ascertain and procure such testimony, considering the circumstances in which he has been placed and the means at his disposal, and that there is a probability of obtaining such testimony if a continuance be granted, it is error to refuse such continuance. (*State v. Hagan*, 22 K. 490.)

864. Ordinarily this court will consider only such questions as are specifically pointed out and discussed by counsel, and will not search through a record for the sake of finding error. (*State v. Stewart*, 24 K. 250.)

865. Where upon a trial for larceny, the larceny is clearly shown, a recent possession by the defendant proved by the state, and a very recent possession admitted by the defendant, coupled with an explanation by him of the manner of acquiring that possession, a jury may be warranted in acting upon that admission of possession, while at the same time from his subsequent statements and conduct, and all the circumstances of the case, giving no credence to his explanation of the manner of acquiring possession. (*State v. Stewart*, 24 K. 250.)

866. The defendant was charged by information with "stealing national bank currency and United States treasury notes of

the amount and value of one hundred and sixty-four dollars." *Held*, That the information cannot, on a motion in arrest of judgment, be held to be insufficient on the ground of a supposed insufficiency in the description of the property stolen. (*State v. Henry*, 24 K. 457.)

867. On the trial on such an information, the court instructed the jury that they might find the defendant guilty if they found that he stole "national bank currency and United States treasury notes, or *either*," and the jury found "the defendant guilty as charged in the information," and found and assessed "the value of the property stolen at the sum of one hundred and sixty-four dollars." *Held*, That the court did not commit any material error in giving said instruction. (*State v. Henry*, 24 K. 457.)

868. The court also instructed the jury that "the possession of property, proven to have been recently stolen, is evidence from which the jury may infer that the person in whose possession such property is found is guilty of the theft, provided that such possession is not explained; and so, when a certain amount of property is proven to have been stolen at the same time, and soon thereafter a portion of such stolen property is found in possession of the defendant, such possession, if unexplained, is evidence from which the jury may infer that the defendant is guilty of the larceny of the entire amount of property then proven to have been stolen." *Held*, Not erroneous, although the property stolen was national bank currency and United States treasury notes. (*State v. Henry*, 24 K. 457.)

869. Under the provisions of the statute, a police judge of a city of the second class has no authority to cause a person charged with an offense against the criminal laws of the state, committed beyond the limits of the corporation, to be examined before him for such an offense, or to commit him to jail therefor, or to hold him by bail for trial before the district court. (*State v. Davis*, 26 K. 205.)

870. Where the examination and commitment by the police judge of a city of the second class are wholly illegal and un-

authorized, and the party committed thereunder executes a recognizance to appear before the district court, in order to be released from illegal custody, such recognizance is without any validity, and no action can be maintained thereon. (*State v. Davis*, 26 K. 205.)

871. A criminal case can be brought from the district to the supreme court for review by appeal only, and cannot be by petition in error. (*McLean v. State*, 28 K. 372.)

872. Matters of continuance, in criminal as in civil cases, are largely within the discretion of the trial court; and where the affidavit therefor is made many months after the arrest, and contains mere general allegations of diligence, is indefinite as to the present location of the witnesses, and does not clearly show any connection between the testimony of such witnesses and the crime of which the defendant stands charged, it cannot be held that the court abused its discretion in overruling the application. (*McLean v. State*, 28 K. 372.)

873. Where a party is charged with the crime of grand larceny, it is not competent for the prosecution to initiate the inquiry as to his general character; and evidence in the first instance that the defendant was reported to belong to a gang of horse thieves, is altogether inadmissible. (*State v. Thurtell*, 29 K. 148.)

874. After a new trial is granted on the motion of the defendant in a criminal case, the attorney for the state, with the consent of the court, has the authority to enter a *nolle prosequi* without prejudice to any fresh prosecution. Thereafter the defendant may be put upon his trial and convicted upon a new information charging the identical offense set forth in the prior information. (*State v. Rust*, 31 K. 509.)

875. In a proceeding in error, the plaintiff is required by the rules of the supreme court to number the pages of the petition in error and the record, and is required to file a written or printed brief which must refer specifically to the pages of the record which he desires to have examined. Where error is alleged, and the only reference in the brief to the por-

tion of the record in which it may be found is to pages "1 to 160 inclusive:" *Held*, That such reference is not sufficient, and does not require an examination of the error assigned. (*State v. McCool*, 34 K. 613.)

876. Newly discovered evidence which is merely cumulative, and which is not of a material and decisive character, is not sufficient cause to warrant the court in granting a new trial. (*State v. McCool*, 34 K. 613.)

877. A statement by the county attorney that "the defendant has been guilty of one penitentiary offense, and would commit a greater offense to cover the other up," when it does not appear in what connection the statement was made, nor whether the county attorney had reference to the offense on trial, and which was not objected to, is not sufficient to compel the granting of a new trial. (*State v. McCool*, 34 K. 613.)

878. It is not misconduct for the county attorney, during his closing argument in a criminal trial, to read from the notes of the official reporter of the court, portions of the testimony upon which he desires to comment. (*State v. McCool*, 34 K. 613.)

879. Where the defendants in a criminal prosecution appeal to the supreme court, and ask for a reversal of the judgment of the court below for incompetency of their own counsel; neglect and failure on the part of the court below to protect their rights and interests; incompetency of the evidence against them; leading questions; erroneous and misleading instructions; insufficiency of the evidence for conviction, it being in part the evidence of an accomplice; the alleged hearing of a motion for a new trial in the absence of the defendants; and the refusal to grant a new trial on the ground of alleged newly discovered evidence, *Held*, Under the circumstances of the case, that no material error was committed by the court below, and that the judgment cannot be reversed. (*State v. Holden*, 35 K. 31.)

880. The question, however, which is attempted to be presented to this court is not in the case, for neither the evidence nor the instructions refused by the trial court have been properly preserved in the record; nor is there anything else in the

record which shows the manner in which the money was stolen. The judgment of the court below will be affirmed, upon the authority of the case of *The State v. McClintock*, ante, p. 40. (*State v. Dorsey*, 37 K. 226.)

881. The evidence in this case does not prove that a certain juror had, before the trial, formed or expressed any opinion with reference to the guilt of the defendant. (*State v. Peterson*, 38 K. 204.)

882. In a criminal prosecution where the only misconduct of the jury was that after they had retired for deliberation and some time prior to their agreement upon a verdict, some one or more of the jurors questioned the correctness of the instructions of the court, stating that they were too favorable to the defendant, and afterward the defendant was convicted and sentenced, *held*, that the judgment of the court below will not be reversed for such misconduct. (*State v. Peterson*, 38 K. 204.)

883. In a criminal prosecution for larceny when the prosecution has to rely wholly upon circumstantial evidence, it is not error to prove the acts and accompanying declarations of a third person for the purpose of showing that the larceny was actually committed, and that such third person was one of the guilty persons, where such acts and declarations do not tend in the least to implicate the defendant in the commission of the offense. (*State v. Peterson*, 38 K. 204.)

884. Where the court refuses instructions as asked for, but gives all that were proper to be given in its general charge, *held*, not error. (*State v. Peterson*, 38 K. 204.)

885. As a general rule, where the court properly instructs the jury, except that it omits some matter which might properly be given, no available error is committed, unless the court has been properly requested to instruct with reference to such matter. (*State v. Peterson*, 38 K. 204.)

886. To make the declarations of one conspirator evidence against the others they must be made in furtherance of the common criminal design. When the conspiracy has ended, or the crime involving conspiracy has been consummated, the ad-

mission of one, in the absence of the other conspirators, that he and others participated in the crime is a mere narrative of a past occurrence, and can affect only the one who makes it. (*State v. Johnson*, 40 K. 266.)

887. It is competent to ask an impeaching witness who has testified that the general reputation of another witness for truth and veracity in the vicinity in which he lives is bad, whether from that general reputation he would give him full credit upon his oath in a court of justice. (*State v. Johnson*, 40 K. 266.)

888. Where there is testimony tending to sustain the defense of *alibi*, interposed by one of the defendants, it is proper for the court to instruct the jury as to the law of such defense; but where the defendant is prosecuted with others upon the theory that all conspired together to commit the crime, and there is testimony supporting it, a direction to the jury that if they found that one of the defendants was not actually present when the crime was committed they should acquit him, was properly refused. (*State v. Johnson*, 40 K. 266.)

LIBEL.

889. In all criminal prosecutions for libel, the truth of the matter charged as libelous is not a full and complete defense unless it appears that the matters charged were published for public benefit; or in other words, that the alleged libelous matter was published for justifiable ends; but in all such proceedings, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact. (*Castle v. Houston*, 19 K. 417.)

890. In all civil actions for libel, brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions, the jury must receive and accept the direction of the court as to the law. (*Castle v. Houston*, 19 K. 417.)

891. In a civil action prosecuted by a party to recover damages against the publisher of a newspaper for an alleged libel, and a plea of justification is filed, and thereon evidence of the truth of the matter published is submitted, and the court instructs the jury to the effect that "the fact of the language being true is not alone an answer to the charge, but can only be shown in mitigation of damages; that it is not a defense simply to show the truth of the matter published, but the party must go further and show that it was not only true but that he did it with good motives and for justifiable ends; that he had some purpose in view that was justifiable; that if the defendant acted honestly, for good purposes, and for justifiable ends, and what he said was true, then he is to be excused or acquitted;" and after a verdict for the plaintiff, on motion of the defendant, the court grants a new trial for misdirection of the jury, *held*, not error, as the instructions are not applicable in a civil action. (*Castle v. Houston*, 19 K. 417.)

892. Where, in an answer to a civil action of libel, the defendant files the defense "that the matters charged as defamatory are true," and no motion is filed to make the answer more specific; no demurrer is presented thereto; no objections are taken on the trial to the proof of the truth of the alleged libelous publication, and the court and all the parties treat the defense as one of justification on the ground of the truth of the publication, *held*, that it is too late after the verdict to attack such answer as insufficient as a plea of justification. (*Castle v. Houston*, 19 K. 417.)

893. In a criminal action against a defendant for libel, where the jury return a verdict of not guilty, and state therein the name of the prosecutor and find that the prosecution was instituted by him without probable cause and from malicious motives, the trial court has no power to set aside so much of the verdict as embraces these findings and adjudge the costs against the county. (*State v. Zimmerman*, 31 K. 85.)

894. Where the defendant is acquitted in a criminal action for libel, and the name of the prosecutor is stated in the ver-

dict, and the jury find that the prosecution was instituted by him without probable cause and from malicious motives, and the court sets aside that portion of the verdict and renders judgment against the county for the costs, *held*, that an appeal may be taken by the state to the supreme court, under subd. 3 of § 283, ch. 82, Comp. Laws 1879. (*State v. Zimmerman*, 31 K. 85.)

895. In a criminal action, where the prosecuting attorney, in making his argument to the jury, claims that the defendant is guilty because he failed to testify in the case and deny the facts alleged against him, and the defendant is afterward found guilty by the jury, *held*, that for such irregularity on the part of the prosecuting attorney, the defendant, on his motion, should be granted a new trial; and that a mere instruction from the court to the jury that the jury should not pay any attention to what was said by the prosecuting attorney with regard to the defendant's failure to testify, is not sufficient to cure the error committed by the prosecuting attorney. (*State v. Balch*, 31 K. 465.)

896. In a criminal prosecution for libel, evidence was introduced tending to show that the defendant, who was an elector of Chase county, Kansas, circulated an article among the voters of such county containing some things that were untrue, and derogatory to the character of the prosecuting witness, who was then a candidate for the office of county attorney of said county. *Held*, That if the supposed libelous article was circulated only among the voters of Chase county, and only for the purpose of giving what the defendant believed to be truthful information, and only for the purpose of enabling such voters to cast their ballots more intelligently, and the whole thing was done in good faith — such article was privileged, and the defendant should be acquitted, although the principal matters contained in the article may have been untrue in fact, and derogatory to the character of the prosecuting witness. (*State v. Balch*, 31 K. 465.)

897. In order that an article published in a newspaper should be held to be libelous as to a particular person, it is necessary that the language of the article should be such that persons seeing it and reading it should, in the light of surrounding circumstances, be able to understand that it referred to such person; but *held*, that the article in the present case answers this description. (*State v. Mayberry*, 33 K. 441.)

898. The following words, published in a newspaper, if false and malicious, as they are alleged to be, are, in Kansas, and under the circumstances of this case, libelous, to wit: "The editor of the *Chronicle* has been intoxicated on several occasions, and that, too, after he was elected to the legislature as the champion of prohibition." (*State v. Mayberry*, 33 K. 441.)

899. In a criminal prosecution for libel, where the defendant is charged with having published that the prosecuting witness had "been intoxicated on several occasions," the defendant may prove, by witnesses acquainted with such prosecuting witness, that they had seen him "acting as though he was intoxicated." (*State v. Mayberry*, 33 K. 441.)

• 900. On a criminal appeal to this court, there being no bill of exceptions, saving the evidence offered on a motion for a change of venue and for a continuance, and there being no journal entries showing when, or on whose application, and under what circumstances, a great number of additional names were indorsed upon the information shortly before trial; and the record presented here being made up in the manner prescribed for bringing civil cases to this court on error, this court will not consider any of the numerous questions discussed with reference to the matters above set forth, and will only determine from the face of the record the questions as to the sufficiency of the information. (*State v. Carr*, 37 K. 421.)

901. On a criminal appeal, all matters not required by statute to be of record, to be available in this court must be embodied in a bill of exceptions, signed, sealed, and ordered to be made a part of the record. (*State v. Carr*, 37 K. 421.)

902. Discretion is largely vested in the trial court to allow

amendments to pleadings, and where pleadings are permitted to be amended, and supplemental pleadings are filed in compliance with an order of the court, such amendments will not be grounds for error, unless it is shown that there is a flagrant abuse of discretion. (*Stith v. Fullenweider*, 40 K. 73.)

903. Where a defendant to a suit for libel pleads justification, he thereby assumes the burden of proof, and is entitled to the opening and closing. (*Stith v. Fullenweider*, 40 K. 73.)

904. Where objections are made to the instructions of a court to a jury, but no specific objections or defects are pointed out, *held*, where such instructions appear to be correct, no careful investigation will be made to discover errors therein. (*Stith v. Fullenweider*, 40 K. 73.)

LICENSE.

(See ORDINANCE.)

905. The proceedings of the code of criminal procedure (Laws 1859, p. 198, § 99), that in "pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title, and the day of its approval, and the court must take notice thereof," only gives an example, but does not require that it shall always be followed. (*Territory v. Reyburn*, McC. 134.)

906. The question of the forfeiture of a ferry charter cannot be tried on an indictment. It can only be inquired into and determined in a proceeding in the nature of *quo warranto* brought for that purpose. (*Territory v. Reyburn*, McC. 134.)

907. All legal defenses to an indictment for a violation of the territorial laws may be made under the plea of not guilty, and a special plea is not necessary. (*Territory v. Reyburn*, McC. 134.)

908. No material averment in an indictment, which is denied by the defendant, is taken as true, but it must be proved in some manner by the prosecution. (*Territory v. Reyburn*, McC. 134.)

909. When it is averred in an indictment that the defendant kept a ferry without a license, it is incumbent on the territory to prove that the defendant had no license. (*Territory v. Reyburn*, McC. 134.)

910. An act of the territorial legislature, granting a ferry franchise, is a contract between the legislature and the grantee, which the legislature can neither change, repeal or impair the obligation of. (*Territory v. Reyburn*, McC. 134.)

911. When a ferry franchise is granted by special act of the legislature, a license from the county tribunal is not required. (*Territory v. Reyburn*, McC. 134.)

912. The legislature may authorize the county tribunals to impose a tax upon all ferries and require the keepers to pay it when so fixed. This may be enforced, but not by indictment. The tax need not be paid until it is fixed by the county tribunal; and if the statute does not provide for its collection, the common law does by civil action. (*Territory v. Reyburn*, McC. 134.)

913. In a proceeding of a criminal nature a vehicle described as a "certain wagon drawn by four horses, and used in the transportation of property and for transferring goods of grocers and merchants," cannot be considered as a "hackney coach, carriage, omnibus or dray." (*Snyder v. North Lawrence*, 8 K. 82.)

914. Where one section of an ordinance provides what kind of vehicles shall be licensed, and the next what amounts shall be paid for such licenses, the use of a general term of description in the latter does not enlarge the scope of the former section, but on the contrary the general words in the latter are limited by the particular words in the former. (*Snyder v. North Lawrence*, 8 K. 82.)

915. There being no special restriction thereon in the constitution of this state, the legislature may confer upon municipal corporations the power to tax employments, as well as property. (*Fretwell v. City of Troy*, 18 K. 271.)

916. Sec. 48 of ch. 60 of Laws of 1871, which in terms

authorizes cities of the third class to levy and collect a *license tax* on certain occupations, was designed for purposes of revenue, rather than of police regulation, and authorizes a tax on those occupations. (*Fretwell v. City of Troy*, 18 K. 271.)

917. Whether it be true or not, that a license tax falls within the general rule of taxation, that it knows no other limit than the discretion of the taxing power, it cannot be doubted that before an ordinance of a city authorized to collect taxes should be declared void on account of the amount of the license, it should appear that an unjust discrimination has been made against the business licensed by casting upon it an undue share of the expenses of the city government; for though the license tax be large, *non constat* but that all other occupations and property are proportionally taxed. (*Fretwell v. City of Troy*, 18 K. 271.)

918. In cities of the third class, that is, cities containing not more than 2,000 inhabitants, and in which it is matter of common knowledge that permanent auction stores are scarcely ever found, a license tax of five dollars a day for sales by auction is not so high that courts can adjudge it void as unreasonable and oppressive, or in restraint of trade. (*Fretwell v. City of Troy*, 18 K. 271.)

919. A provision in the statute, that license taxes "shall be at such rate per year as shall be just and reasonable," does not render void an ordinance requiring in cases of auction licenses the payment of so much "for each day of the continuance of such auction." (*Fretwell v. City of Troy*, 18 K. 271.)

920. In the first section of an ordinance it was provided that "before any person shall proceed to sell at public auction merchandise of any class whatever, he shall first obtain a license for an auction; etc.;" and in the second, that "any person desiring to exercise the office or calling of an auctioneer, shall first obtain a license therefor." *Held*, That there was no identity between these two sections in the subject matter of the license; that the first refers to the party who has goods which he is seeking to have sold by auction, and the second to the party by

whom the outcry of the sale is to be made. (*Fretnell v. City of Troy*, 18 K. 271.)

921. The constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title," has no application to city ordinances. (*City of Humboldt v. McCoy*, 23 K. 249.)

922. In a city of the second class an ordinance may be passed at a special meeting of the city council, and the special meeting may be called by the acting mayor, in the absence of the mayor from the city, upon the request of three members of the city council, although one of such members may at the time be the acting mayor himself. (*McGrath v. City of Newton*, 29 K. 364.)

923. In such a city an ordinance may become a law, and may be valid without the signature of either the mayor or the acting mayor; and it may also be valid where it is approved by the acting mayor, and where the acting mayor's name is signed to it by the city clerk in the absence of the acting mayor, but at his request. (*McGrath v. City of Newton*, 29 K. 364.)

924. Where an ordinance of a city of the second class levies a license tax on more than twenty different kinds of business, *held*, under the facts of this case, that the ordinance is not so inequitable or unreasonable as to be invalid as to every one and all of the various kinds of business which it taxes, even if it is invalid to any one of them. (*McGrath v. City of Newton*, 29 K. 364.)

925. The title of said ordinance reads as follows: "An ordinance to provide for a business license tax." *Held*, That the title is sufficient under § 9, ch. 19, of the second-class city act. (*McGrath v. City of Newton*, 29 K. 364.)

926. Said ordinance is founded upon § 47, ch. 19, of the second-class-city act, as amended by § 3, ch. 40, of the Laws of 1881. *Held*, That neither the ordinance, nor said § 47, as thus amended, is wholly and entirely void, (even if void in any respect,) on the ground than said § 47 as thus amended is in contravention of § 4, art. 11, or § 5, art. 12, of the constitution. (*McGrath v. City of Newton*, 29 K. 364.)

927. A city ordinance of a city of the second class levies taxes upon various kinds of business. These various taxes are levied by different sections of the ordinance, in different modes, in various amounts, and have no connection with each other. Afterward, over sixty different plaintiffs, representing more than twenty different kinds of business, commence an action to perpetually enjoin the various taxes levied against them. *Held*, That these various classes of persons, representing various classes of business, have no community of interest with each other, and that their various causes of action are improperly joined, and that they cannot jointly maintain this action. (*McGrath v. City of Newton*, 29 K. 364.)

928. In the absence of any inhibition, express or implied, in the constitution, the legislature has power, either directly to levy and collect license taxes on any business or occupation, or to delegate like authority to a municipal corporation. (*City of Newton v. Atchison*, 31 K. 151.)

929. In the constitution of this state there is no such inhibition, express or implied. Sec. 1 of art. 11 applies exclusively to taxation of property, and does not refer to license taxes; neither does it impliedly prohibit the collection of such taxes. (*City of Newton v. Atchison*, 31 K. 151.)

930. Sec. 3 of ch. 40, Laws 1881, gives express authority to cities of the second class to levy and collect license taxes. (*City of Newton v. Atchison*, 31 K. 151.)

931. While it may be conceded under § 5, art. 12 of the state constitution, that in the organization of cities some restriction should be imposed on their power of taxation, assessment, etc., so as to prevent the abuse of such power, yet what restrictions there shall be is a matter for the legislature to determine; and if any have been imposed, the courts may not interfere on the ground that such restrictions do not seem adequate. (*City of Newton v. Atchison*, 31 K. 151.)

932. In the organization of cities of the second class there are sufficient restrictions to uphold the grant of power to levy

and collect license taxes (*City of Newton v. Atchison*, 31 K. 151.)

933. It is no objection to the validity of a license tax that, instead of being a fixed sum, it is graduated by some standard, provided such standard is reasonably fair and just. (*City of Newton v. Atchison*, 31 K. 151.)

934. That a tax which is in terms a license tax upon merchants is graduated by the average amount of stock, and is thus proportioned in the same manner as the ordinary property tax, does not change its character, or transform it from a license to a property tax, or make it in any [illegal] sense double taxation. (*City of Newton v. Atchison*, 31 K. 151.)

935. Where a city of the third class levies license taxes upon various kinds of business and occupations, and in doing so levies an annual license tax of \$80, payable quarterly, in installments of \$20 each, upon druggists having permits from the probate judge to sell intoxicating liquors, and levies an annual license tax of \$5 upon druggists not having such permits, *held*, that the license tax levied upon druggists having such permits is not illegal, or void. (*Tulloss v. Sedan (City)*, 31 K. 165.)

936. An ordinance of a city of the third class requiring a "professional hawker or peddler of any article of merchandise or traffic usually kept for sale by any merchant or manufacturer of the city" to pay a license of \$2.50 per day for selling or offering for sale "any such article of merchandise, or traffic at retail," is not void for the reason that it is class legislation, or that it makes unjust discrimination, or is partial and oppressive in its operation, or is inconsistent with public policy. (*City of Cherokee v. Fox*, 34 K. 16.)

937. Nor is such an ordinance void for the reason that it has no title, when in fact its title corresponds precisely with the requirements of the statute. (Third class city acts, § 17; Comp. Laws of 1879, p. 189.) (*City of Cherokee v. Fox*, 34 K. 16.)

938. Where a person is prosecuted before the police judge of the city for a violation of such ordinance, the complaint is not void for the reason that the letters "J. P." instead of the

letters "P. J." or the words "Police Judge," are attached to the name of the police judge where he signs the jurat attached to the complaint. (*City of Cherokee v. Fox*, 34 K. 16.)

939. There was some evidence introduced on the trial tending to prove every material allegation of the complaint; and whether it proved the same or not is a question of fact and not one of law, and the supreme court cannot say that the complaint was not proved. (*City of Cherokee v. Fox*, 34 K. 16.)

940. Under an act of the legislature giving to cities of the third class the power to levy license taxes upon attorneys at law residing in the city, such cities have no power to levy license taxes upon attorneys at law having offices in the city, and doing business therein, but who do not reside in the city. (*City of Garden City v. Abbott*, 34 K. 283.)

941. Where an agent, such as is usually denominated a "drummer," or "commercial traveler," simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterward to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchasers to the principal on such delivery, such agent is neither a peddler nor a merchant. (*City of Kansas v. Collins*, 34 K. 434.)

942. Nor will a single sale and delivery of goods by such agent, or by any other person, out of the samples exhibited, or out of any other lot of goods, constitute such agent or other person a peddler or a merchant. (*City of Kansas v. Collins*, 34 K. 434.)

943. Nor does there seem to be any authority under the statutes for cities of the second class to levy license taxes upon drummers or commercial travelers. (*City of Kansas v. Collins*, 34 K. 434.)

944. A city granted to a corporation a franchise to construct and operate a street railroad within its limits, and in the ordinance conferring the grant provided how and when it should be constructed, and the manner in which it should be maintained. *Held*, That the grant thus made will not exempt the

corporation from reasonable regulation by the city in the operation of the road, nor will it prevent the city from levying and collecting a license tax thereon. (*City of Wyandotte v. Corrigan*, 35 K. 21.)

945. Grants of this class are not to be extended by construction beyond the plain terms in which they are conferred, but should be construed strictly against the corporation, or those claiming under the grant, and in favor of the public. (*City of Wyandotte v. Corrigan*, 35 K. 21.)

946. An agent or employé of such corporation who knowingly operates or assists in operating a street railway when the license tax imposed on such business is unpaid, will be liable to prosecution and punishment, as prescribed by the ordinance. (*City of Wyandotte v. Corrigan*, 35 K. 21.)

947. A city ordinance of a city of the second class providing for the levy and collection of a license tax on lumber dealers is authorized by the act incorporating such cities, as lumber dealers are included in the general designation of "merchants and retailers." (*Campbell v. City of Anthony*, 40 K. 652.)

948. A person acting as the agent of a non-resident lumber company as a salesman within the corporate limits of the city, who knowingly assists in the conduct of its business, when the license tax imposed on the lumber dealer is unpaid is liable to prosecution and punishment as prescribed by the ordinance. (*Campbell v. City of Anthony*, 40 K. 652.)

949. A city cannot be empowered by the laws of its own state to impose a license tax upon a commercial "drummer," or other person, of another state, for merely offering to sell goods within the city by sample, where the goods are to be brought from another state and where the owner of the goods does not reside within the state where the goods are offered for sale, following the case of *Robbins v. Shelby Taring District*, 120 U. S. 489. (*City of Fort Scott, Kansas, v. Pelton*, 39 K. 764.)

950. The act of the legislature of Kansas of 1870, incorporating cities of the first class, (Laws of 1870, ch. 47,) which

provides that the mayor and council of such cities shall have power to enact ordinances, "to levy and collect a license tax on fire or life insurance companies or agencies, and to impose fines, forfeitures and penalties for the breach of any ordinances," does, by its terms, give to the mayor and council of a city of the first class the power to enact an ordinance which shall provide that every fire or life insurance company intending to do business in such city shall first obtain a license from the city to do such business, that the price of each license shall be fifty dollars for a fire insurance company, and one hundred dollars for a life insurance company; and that any person who shall violate such ordinance shall, upon conviction, be fined not less than fifty dollars nor more than two hundred dollars, etc. (*City of Leavenworth v. Booth*, 15 K. 627.)

951. Where a city of the first class did, in 1870, in pursuance of such statute, enact such an ordinance as that above mentioned, *held*, that an act of the legislature of 1871, creating the insurance department, (Laws of 1871, page 214, *et seq.*) did not repeal or modify said statute of 1870, or said ordinance; so as to exempt from the operation of said ordinance that class of foreign corporations doing business in Kansas and in said city, which pays to the superintendent of insurance, under § 17 of the Laws of 1871, on account of the laws of their own state, an amount greater than that ordinarily paid by other insurance companies. (*City of Leavenworth v. Booth*, 15 K. 627.)

952. Neither said statute of 1870, nor said ordinance, so far as either has any application to this case, is in violation of § 1, art. 11 of the constitution, which requires that "the legislature shall provide for a uniform and equal rate of assessment and taxation." (*City of Leavenworth v. Booth*, 15 K. 627.)

953. And *further held*, that neither said statute of 1870, nor said ordinance, so far as either has any application to this case, is in violation of § 4, art. 11 of the constitution, which provides that "no tax shall be levied except in pursuance of a law which shall distinctly state the object of the same,"

although said ordinance may not distinctly state what shall be done with the money paid by the insurance companies for licenses. (*City of Leavenworth v. Booth*, 15 K. 627.)

LIQUOR—DRAMSHOP—PROHIBITION.

954. An indictment as follows: "SECOND JUDICIAL DISTRICT, TERRITORY OF KANSAS.—The grand jurors summoned, impaneled and sworn, and charged to inquire in and for the body of the second judicial district of the territory of Kansas, upon their oaths present: That one Charles Freeman, late of Douglas county, in the district and territory aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and fifty-eight, in the district aforesaid, did sell spirituous liquors, without taking out and having a license as 'grocer,' dramshop keeper or tavern keeper, contrary to the statute in such cases made and provided, and against the peace and dignity of the territory of Kansas," is bad because it does not lay the venue in any county in said second judicial district. (*Territory v. Freeman*, McC. 56.)

955. When the record shows that the indictment was presented by the grand jury in open court, it will be inferred that it was done according to law, through their foreman. But it would not affect the accused if it was handed in by any other member of their body, in their presence. A technical defect like this would be disregarded under § 276 of the criminal code. (*Laurent v. State*, 1 K. 313.)

956. The evidence which the law requires, to show a concurrence of the requisite number of the grand jury in finding the indictment, is the indorsement of "a true bill" thereon, and the signature thereto of the foreman. (Crim. Code, 1859, § 77.) (*Laurent v. State*, 1 K. 313.)

957. An averment in an indictment as follows: "That Louis Laurent did on," etc., "at," etc., "unlawfully and knowingly sell, exchange, give, barter and dispose of to one Cheek-Wah,

there and then being an Indian of the Pottawatomie tribe and nation, and not a citizen of the United States, nor of the state of Kansas, certain spirituous liquors and wines, to wit: one pint of whisky, one pint of brandy and one pint of wine, the same not having been directed by any physician for medical purposes or otherwise," charges an offense in the language required by law, and contains all the negative averments required by the statute. Sufficient appears to describe the crime and the person charged, and to enable the court to pronounce judgment upon a conviction, and that judgment could be pleaded in bar of any subsequent prosecution for the same offense. (*Laurent v. State*, 1 K. 313.)

958. Sec. 16, art. 2, of the constitution was intended solely for the government of the legislature that should convene under it, and not as a rule for the construction of statutes passed before the constitution went into effect. (*Laurent v. State*, 1 K. 313.)

959. A ground for quashing an indictment for a violation of the law "to restrain dramshops and taverns, and regulate the sale of intoxicating liquors," (Comp. Laws, 486,) "that it does not charge that the offense was not committed within the limits of an incorporated city containing one thousand inhabitants," held insufficient, the provision in § 15 of that act, excepting such cities from its operations, not being one of those exceptions necessary to be negatived in the indictment. (*State v. Thompson*, 2 K. 432.)

960. The rule is: "If there be any exceptions contained in the same *clause* of the act which creates the offense, the indictment must show negatively that the defendant, or the subject of the indictment, does not arise within the exception. But if a proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading." (*State v. Thompson*, 2 K. 433.)

961. Article 2 of the constitution of Kansas is devoted to prescribing rules for, and defining the duties and powers of legislative bodies under the *constitution*. (*State v. Thompson*, 2 K. 433.)

962. It cannot be conceived that the first clause of § 17 art. 2 of the constitution, providing that "all laws of a general nature shall have a uniform operation throughout the state," was intended to have the retroactive effect of abrogating laws already passed. The decision in *Albyer v. State*, 10 Ohio St. 589, deciding a similar point with reference to an identical constitutional provision, in the same way, may well have been considered, by the framers of our constitution, as deciding the construction of the language. (*State v. Thompson*, 2 K. 433.)

963. On a motion to quash an indictment under the dramshop act (Comp. Laws, 486), for selling intoxicating liquors without license, it was *held*: 1st. An allegation that the offense was committed at "Ogden, in the county of Riley, in a stone building used and occupied by the defendant as a grocery and dwelling house at the time of the sale," is a sufficient description of the place. 2d. An allegation "that the liquor was sold by the defendant to," etc., was a sufficient allegation of the price, and under it all necessary and relevant proof of the sale could be introduced—a sale implies a consideration. 3d. An allegation that the offense was committed "at Ogden, in the county of Riley, aforesaid," following the caption that "the jurors of the grand jury of the county of Riley and state of Kansas, impaneled," etc., is a sufficient laying of the venue. 4th. The fourteenth section of the dramshop act (Comp. Laws, 489), does not confer exclusive jurisdiction upon justices of the peace to hear and determine cases arising under said act where the fine is less than \$100; but was intended to provide a concurrent jurisdiction for summary punishment, with the jurisdiction conferred upon the District Court (see § 297, Crimes Act, Comp. Laws, 345), and *held*, that it was not necessary to allege in the indictment that the offense was a second offense finable more than \$100. 5th. The indictment is sufficiently

definite to sustain a conviction and judgment. (*State v. Muntz*, 3 K. 384.)

964. The decision in the State of Kansas, Appellant, v. Adelbert Muntz, Appellee, (*ante*, p. 383,) confirmed. (*State v. Pauly*, 3 K. 388.)

965. The intention of the legislature in an act of Feb. 14, 1857, (Private Laws 1857, pp. 299, 300,) and in the supplemental act of Jan. 27, 1858, (Private Laws 1858, p. 296,) was to confer upon the authorities of Topeka powers and privileges similar to those conferred upon the authorities of the city of Leavenworth by the act of 1855, (Private Laws 1855, pp. 837, 417,) as amended by the acts of Feb. 20, and 23, 1857, (Private Laws 1857, pp. 253-4;) and *held*, that thereby Topeka was made an incorporated city. (*State v. Young*, 3 K. 445.)

966. The rule of construction that municipalities take nothing by implication, does not apply when the inquiry is merely to the effect of whether there is a corporation; every intentment must be taken in favor of the sufficiency of the legislative action. (*State v. Young*, 3 K. 445.)

967. *Semble*, The power of the city of Topeka to pass ordinances is full and complete. (*State v. Young*, 3 K. 445.)

968. The creation of municipal corporations is a "rightful subject of legislation," within the meaning of § 24 of the organic act, [Laws 1855, p. 34.] (*State v. Young*, 3 K. 445.)

969. This power necessarily includes the power to make by-laws or ordinances for the government of the inhabitants, and to enforce them. (*State v. Young*, 3 K. 445.)

970. The administration of municipal ordinances is the exercise of a species of judicial power, but is no part of the judicial power contemplated by the 27th section of the organic act, (Laws 1855, p. 35,) which section refers only to the enforcement of the laws of the territory at large; and *semble*, the courts in that section named were to have exclusive cognizance of all subjects arising directly under the laws of the legislature at common law and in chancery. *Held*, That the creation of munic-

ipal courts for the enforcement of municipal regulations is not inconsistent with this section. (*State v. Young*, 3 K. 445.)

971. Where an indictment was found May 24, 1865, in Shawnee county, under the dramshop act, (Comp. Laws, p. 486,) against the appellees, for selling liquor on May 1, 1865, without license, and where appellees (defendants below) pleaded to the jurisdiction that the act complained of was committed in Topeka, a city of more than 1,000 inhabitants, having laws punishing, and a tribunal having exclusive jurisdiction of the offense, to which plea a demurrer was filed, *held*, that under the fifteenth section of the dramshop act the decision of the court below overruling the demurrer should be sustained. (*State v. Young*, 3 K. 445.)

972. Ruling in the *State v. Thompson*, 2 K. 432, that § 15 of the dramshop act is not in conflict with the constitution (§ 17, art. 2) sustained. (*State v. Young*, 3 K. 445.)

973. The place of the alleged offense of selling intoxicating liquors without license, must be so described in the indictment as that an officer executing process would be able to identify it. One reason is because, under the "dramshop" act, all places where intoxicating liquors are sold in violation thereof, may be shut up and abated as public nuisances. (*Hagan v. State*, 4 K. 90.)

974. In such a case, a description in an indictment "that Albert Hagan, on or about the 18th day of November, A. D. 1865, a certain frame building used and occupied by the said A. J. Hagan as a store in Council Grove, in the county of Morris aforesaid, did, without taking out a license, as a grocer, dramshop keeper, or tavern keeper, sell spirituous, vinous, and other intoxicating liquors to John Schmidt, contrary," etc., *held* bad on motion to quash. It is error, in such a case, for the court to refuse to instruct the jury that they "must believe, from the evidence, that the place where the liquor was sold was the same place described in the indictment, before they can convict." *Held*, That the place where the offense is charged to have been committed, must be proved as laid. (*Hagan v. State*, 4 K. 90.)

975. When the law of 1867, chapter 49, provided for an appeal from the judgment of a justice of the peace, in a criminal case, and further, that on such an appeal being taken, the case should be tried *de novo* in the appellate court: *Held*, That it was error in such appellate court to try such a case as upon a *petition in error*. (*State v. Young*, 6 K. 37.)

976. Chapter 50 of the Laws of 1867 required that all actions for misdemeanor should, on appeal, be tried as if they had originated in the court to which they were appealed. (*State v. Young*, 6 K. 37.)

977. The sale of spirituous, vinous, fermented and other intoxicating liquors, without a license, is a criminal offense and a misdemeanor. (*State v. Volmer*, 6 K. 371.)

978. After the state has proved that the defendant sold lager beer, the state may then prove (if it be denied by the defendant) that lager beer is an intoxicating liquor. (*State v. Volmer*, 6 K. 371.)

979. Under the statutes of this state, all fermented liquor is presumed to be intoxicating; and if the defendant denies that the fermented liquor sold by him is intoxicating, it devolves upon him to remove the presumption of law by evidence. (*State v. Volmer*, 6 K. 371.)

980. It would seem that a third party's advertisement in a newspaper is not admissible in evidence. (*State v. Volmer*, 6 K. 371.)

981. The court is not bound to repeat its instructions to the jury. (Affirming *Topeka v. Tuttle*, 5 K. 311.) (*State v. Volmer*, 6 K. 371.)

982. Before a person can make himself liable to be convicted of a second offense, as such, under § 3 of the dramshop act, he must previously have been convicted of the first offense; but it is not necessary that the first conviction should be first satisfied by a payment of the fine, or by a pardon. (*State v. Volmer*, 6 K. 379.)

983. The effect of the conviction where a person is sentenced to pay a fine only, may be suspended for all purposes by an

appeal, until the case shall be finally determined on the appeal; and then if it appears that the conviction was erroneous or illegal, its effect will be totally destroyed for all purposes; but if it was correct, then it will have the same effect as though no appeal had ever been taken. (*State v. Volmer*, 6 K. 379.)

984. An appeal from a judgment of conviction in a criminal cause suspends the effect of such judgment, (where the sentence is to pay a fine only,) until final judgment is pronounced in the appellate court. (*State v. Volmer*, 6 K. 379.)

985. It is not necessary, under the dramshop act, that a person who desires to keep a dramshop, tavern or grocery in an incorporated town or city should procure a license therefor from the tribunal transacting the county business. (*State v. Pitman*, 10 K. 593.)

986. An information under the dramshop act charging that the defendant sold intoxicating liquors "in the town of Jacksonville, Neosho county, Kansas," "without taking out and then having a license as grocer, dramshop keeper, or tavern keeper, *from the tribunal transacting county business of said county of Neosho*," is not sufficient. The words in italics should be omitted, or the words, "or from the council of any incorporated town or city," or some other words which would show that the liquor was not sold in any incorporated town or city under license from the city council, should be added, in order to make the information sufficient. (*State v. Pitman*, 10 K. 593.)

987. The court cannot take judicial notice whether a town or city is incorporated or not. (*State v. Pitman*, 10 K. 593.)

988. In criminal cases, on an application for a change of venue on account of the prejudice of the judge, such facts and circumstances must be shown by affidavits or other evidence as clearly establishes such prejudice; and unless it be by such testimony clearly established, a reviewing court will sustain an overruling of the application, on the ground that the judge must have been personally conscious of the falsity or non-existence of the grounds alleged. (*City of Emporia v. Volmer*, 12 K. 622.)

989. A prosecution in a municipal court for a violation of a city ordinance may, if authorized by statute, be in the name of the city. (*City of Emporia v. Volmer*, 12 K. 622.)

990. A complaint for a violation of a city ordinance filed in the municipal court need not recite in full the ordinance alleged to have been violated. (*City of Emporia v. Volmer*, 12 K. 622.)

991. Authority in the charter "to restrain, prohibit, and suppress tippling shops," will sustain an ordinance licensing such shops, and prescribing penalties for keeping one without a license. (*City of Emporia v. Volmer*, 12 K. 622.)

992. Where a statute authorizes a trial before a municipal court without a jury, for a violation of a city ordinance, and at the same time secures to the defendant an appeal therefrom, clogged by no unreasonable restrictions, to an appellate court in which he has a right to a trial by a jury, such summary proceeding is not in conflict with the constitutional provision that the "right of trial by jury shall be inviolate." (*City of Emporia v. Volmer*, 12 K. 622.)

993. Under a complaint charging an offense upon one day, a defendant may ordinarily be convicted of committing the offense upon some other day, and the time alleged is not material. Hence, in questioning jurors as to whether they had formed any opinion as to the defendant's guilt, the question should not be limited to the day charged. But when it has been so limited, if thereafter the investigation be limited to that precise day, and the jury are instructed that unless they find that the defendant committed the offense upon that day they must acquit, *held*, that the substantial rights of the defendant have not been prejudiced. (*City of Emporia v. Volmer*, 12 K. 622.)

994. The terms "tippling shop" and "disorderly house," have in the law well settled and well defined meanings, and those meanings are not identical, nor is either necessarily included in the other. (*City of Emporia v. Volmer*, 12 K. 622.)

995. Under the Laws of 1872, the council of cities of the second class had power to enact ordinances to prohibit and

suppress tippling shops. (*City of Emporia v. Volmer*, 12 K. 633.)

996. While a grand jury should only be called by order of the district court, yet when one has been called by order of the judge in vacation, and has been impaneled, charged and sworn by the court, it is a *de facto* grand jury, and under §79 of the code of criminal procedure no objection is good to an indictment presented by it on account of the manner of its organization, which does not imply corruption in such organization. (*State v. Marsh*, 13 K. 596.)

997. A liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents. (*Haug v. Gillett*, 14 K. 140.)

998. Where an offense is charged to have been done in a specific house on a certain lot and block "in the city of Ottawa, and county of Franklin," and against the peace and dignity of the state of Kansas, the venue is sufficiently alleged, although it is not alleged in any other way that the offense was committed in the state of Kansas. (*State v. Walter*, 14 K. 375.)

999. A prosecution in a municipal court under a city ordinance for a matter which is penal by the laws of the state, or made penal because of its supposed evil consequences to society, is a criminal action; and if after an appeal to the district court, and a judgment therein, it is sought to bring the case to this court for review, it can be done only by appeal, and not by proceeding in error. (*Neitzel v. City of Concordia*, 14 K. 446.)

1000. Whether the rule would be different if the prosecution was simply to enforce a private right of the city, is a question left open for further consideration. (*Neitzel v. City of Concordia*, 14 K. 446.)

1001. Where a wholesale liquor dealer obtains a license signed by the mayor, clerk and treasurer of a city of the second

class, authorizing him to sell intoxicating liquors at wholesale in said city, and he afterwards in pursuance thereof sells intoxicating liquors at wholesale, *held* in an action brought by the vendor of such liquors against the vendee for the price of the liquors:

(1) That the license, if granted by the city council of said city specially to the wholesale dealer, is valid;

(2) That in the absence of anything to the contrary it will be presumed that the license was regularly granted and issued;

(3) That it is not necessary that the license should be issued to some person who is actually a grocer, a dram-shop keeper, or a tavern keeper, in order to be valid;

(4) That the license need not upon its face and in direct terms purport to be a grocery license, a dram-shop license, or a tavern license; but if it clearly appears upon its face that it is a license to sell intoxicating liquors, it is sufficient;

(5) That being issued as a license to sell intoxicating liquors at wholesale and not at retail, does not invalidate the license as a license to sell at wholesale. (*Williams v. Louis*, 14 K. 605.)

1002. In a criminal prosecution where the defendant has pleaded "not guilty" to the charge, and where the case is submitted to the court, without a jury, for decision, upon an agreed statement of facts, and the court upon such agreed statement of facts "finds for the defendant," *held*, that such finding is equivalent to a finding or verdict of "not guilty," and is conclusive; and that this court cannot, on an appeal, either ignore said finding, or set it aside, although it may be ever so erroneous, and although the agreed statement of facts may clearly show that the defendant was guilty. (*City of Olathe v. Adams*, 15 K. 391.)

1003. Where M., doing business in Leavenworth, upon samples there shown him by G., a wholesale liquor dealer in St. Louis, orders a bill of liquors from G., which liquors upon such orders are selected from G.'s stock of goods in St. Louis and shipped to M. at Leavenworth, *held*, that the sale was made in St. Louis, and that it was not necessary for G. to have

a license to sell liquor from the authorities of Leavenworth. (*McCarty v. Gordon*, 16 K. 35.)

1004. The fact that it was expressly agreed between the parties that, in case the liquors sent did not correspond in quality or quantity with the samples shown, and the bill ordered, M. might refuse to receive them, and might return them to St. Louis at the expense of G., will not change the place of sale to Leavenworth. (*McCarty v. Gordon*, 16 K. 35.)

1005. When, in an action brought by G. to recover of M. for six barrels of whisky sold by G. as above stated, no special findings of fact are made, but only a general finding for plaintiff, and where it appears from the testimony of defendant that one of such barrels was found upon arrival in Leavenworth to be inferior to the sample, and thereupon said defendant refused to receive it and notified the plaintiff thereof, and the latter requested the defendant not to return the barrel, but to wait until plaintiff should come to Leavenworth, and that upon the coming of the latter to Leavenworth a new contract was made by which this barrel was sold and delivered to defendant in Leavenworth for less than the original price, and where it appeared from the account that the several barrels differed in the number of gallons and the price per gallon, and there was nothing to show which one of the barrels was thus sold, and where it also appeared that the defendant had made upon the account, and subsequent to the delivery of the liquors, payments more than enough to pay for any one barrel, without specifying to what such payment should be applied, *held*, that a general finding in favor of the plaintiff for the entire unpaid portion of the account would not be set aside. (*McCarty v. Gordon*, 16 K. 35.)

1006. In July, 1871, the city of Salina, a city of the third class, passed an ordinance providing for the issuance of licenses upon certain terms and conditions to persons to sell intoxicating liquors, and providing for punishing by fine such persons as should sell intoxicating liquors without taking out or having such a license. Said ordinance was valid. During the year 1874 the

defendant was a druggist, and kept drugs, medicines and intoxicating liquors for sale in said city. He did not take out or have any license to sell intoxicating liquors. He employed a clerk for the drug store, and authorized said clerk to sell said drugs, medicines, and intoxicating liquors. On May 16, 1874, said clerk sold in said drug store, one gallon of said intoxicating liquor. The city of Salina immediately commenced a prosecution against the defendant for selling said liquor in violation of said ordinance. The action was commenced before the police judge of said city. It was afterwards taken on appeal to the district court, and there tried again on its merits. The defendant was found guilty in the district court, and sentenced to pay a fine of \$50. *Held*, That said ordinance was and is valid; that each of said courts had jurisdiction to try the cause; that no error is perceived in the ruling of the court below; that the defendant would have been liable even if said liquor had been sold for medical purposes only. (*City of Salina v. Seitz*, 16 K. 143.)

1007. In a criminal prosecution, where the defendant has pleaded not guilty to the charge, and where the case is submitted to the court without a jury for decision, either upon testimony or an agreed statement of facts, and the court finds the defendant not guilty, such finding is conclusive, and cannot be set aside and a new trial granted either upon appeal or by petition in error. (*City of Olathe v. Adams*, 15 K. 391; *City of Oswego v. Belt*, 16 K. 480.)

1008. Statutes are not considered to be repealed by implication unless the repugnancy between the provisions of the new and the former statutes is plain and irreconcilable. The statute authorizing cities of the third class to license the sale of intoxicating liquors, does not repeal the provisions of the dramshop act of 1868. (*State v. Young*, 17 K. 414.)

1009. Different statutes relating to the same subject matter are to be construed together. (*State v. Young*, 17 K. 414.)

1010. Cities of the third class have the power to license persons to sell intoxicating liquors within their limits, subject to a

compliance with the provisions of the dramshop act of 1868. (*State v. Young*, 17 K. 414.)

1011. The presentation of a petition to the city council by a person applying for a dramshop license, as required by §1 of the dramshop act of 1868, is an essential condition precedent to the validity of a license to sell intoxicating liquors within the limits of a city of the third class. A license granted by the corporate authorities of a city of the third class in violation of the provisions of said act is no protection to the licensee, and is null and void. (*State v. Young*, 17 K. 414.)

1012. Where an action is brought upon three promissory notes and the only defense made is that the notes were given for intoxicating liquors sold in this state without a license, and the evidence does not tend to prove the defense, *held*, the trial court commits no error in instructing the jury to return a verdict for the principal and interest of the notes sued on. (*Snider v. Koehler*, 17 K. 432.)

1013. The cases of *McCarty v. Gordon* and *Gill v. Kaufman & Co.*, 16 K. 35, 571, and *Williams v. Feiniman*, 14 K. 288, *Haug v. Gillett*, 14 K. 140, cited as decisive of the questions presented in this case. (*Snider v. Koehler*, 17 K. 432.)

1014. Where intoxicating liquor is sold in violation of the laws of Kansas, and a promissory note is given by the vendee to the vendor for the amount agreed to be paid for such liquor, the collection of such note cannot be enforced by the vendor against the vendee under the laws of Kansas. (*Glass v. Alt*, 17 K. 444.)

1015. And it can make no difference that the vendor sold the liquor on a month's credit, and that the note was not given until the end of such month, and was then given on an extension of the time for payment still another month; nor can it make any difference that the note was dated "Kansas City, Mo.," (being in fact executed in Kansas,) and made payable "at Kansas City Savings Bank." (*Glass v. Alt*, 17 K. 444.)

1016. Two complaints were filed charging defendant with selling liquor without license to the same person at the same

place, but on different days about a week apart. He pleaded guilty to the first, and was sentenced; and then pleaded this conviction in bar of the second prosecution. The prosecuting witness was sworn, and over defendant's objection testified that there were the two sales on the two days named in the complaints. *Held*, That, as upon the face of the complaints two separate offenses appear to be charged, and that, although the matter of exact time may be so far immaterial that under each complaint either offense might be proved, yet as in consequence of the plea of guilty no testimony was in fact offered on the trial of the first complaint, proof was admissible on the trial of the second of the exact time of the two offenses; and the plea to the first will be considered as made to the offense committed on the very day named therein, and the conviction a bar to prosecution for only that offense. (*State v. Shafer*, 20 K. 226.)

1017. An allegation in a complaint for selling liquor in violation of a city ordinance, that the offense was committed in a certain one-story frame building, within the city limits, known as West's drug store, is sufficient as a description of the place of the offense. (*West v. City of Columbus*, 20 K. 633.)

1018. A complaint in a police court of a city for violation of one of the ordinances, is sufficient, although no part of the ordinance is copied into it, and no express reference is made thereto by date, number, or otherwise, providing the acts or conduct of the defendant in violation of the ordinance are fully and clearly charged. (*West v. City of Columbus*, 20 K. 633.)

1019. The act of 1871, for the organization of cities of the third class, changed all incorporated towns, having not more than two thousand inhabitants, into cities of the third class; and thereupon the original corporate name of each such town was changed with the change effected in its organization; and thereafter its corporate name and style should be, and is, "The City of —," (mentioning the proper name.) (*West v. City of Columbus*, 20 K. 633.)

1020. Sec. 2 of ch. 86 of the General Statutes, is a valid and constitutional enactment, and is not avoided by that section of

the constitution which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." (*City of Eureka v. Davis*, 21 K. 578.)

1021. The list prescribed by said chapter, showed 341 adult residents of the city of Eureka, a city of the third class. A petition for a dram shop license, containing but 156 names, was presented to the city council, approved by the council, and license ordered to be issued. A license was issued, signed by the mayor and attested by the clerk, and the license fee paid into the city treasury. *Held*, That such license, having been issued in plain disregard of the law, was void, and offered no protection to the defendant in the sale of intoxicating liquors, and that the city was not estopped by the illegal and unauthorized acts of its officers from prosecuting the defendant for a violation of the city ordinance. Further, *held*, that that which the city council may not do directly, it may not do indirectly; that as it may not pass an ordinance to authorize the issue of licenses for the sale of intoxicating liquors, without a petition of a majority of the adult residents, so it may not, after enacting a legal ordinance, grant a valid license upon a petition signed by less than half the number of adult residents, as shown by the official list. (*City of Eureka v. Davis*, 21 K. 578.)

1022. Cities of the third class have the power to issue licenses to dramshop keepers for the sale of intoxicating liquors for a period of less than one-fourth of a year, which licenses may be made to expire on or at any time prior to the first day of May next after the same are issued. (*State v. Simmons*, 21 K. 685.)

1023. In an indictment for selling liquor without license, the pleader, if he attempts to negative the forms of license by name, should include all the different forms of license by which authority to sell liquor may be granted. (*State v. Pitzer*, 23 K. 250.)

1024. The dramshop act names only three forms of license: dramshop, tavern, and grocer; but the act providing for cities of the second class authorizes the city council to issue licenses in other forms. Therefore, where the selling is charged to

have been done in such a city, the indictment is insufficient if, attempting to specify the forms of license, it simply negatives the three forms named in the dramshop act. (*State v. Pitzer*, 23 K. 250.)

1025. The corporate authorities of a city of the third class have no power or jurisdiction to license any person to carry on a dramshop within the limits of such a city, unless the petition presented to the city council is signed by a majority of the residents of the city, of twenty-one years of age and over, both male and female; and in the absence of the list, prescribed by § 2, ch. 35, Comp. Laws 1879, showing the number of adult persons in the city, some sufficient method should be adopted by the authorities to ascertain the actual number of adult residents of the city, before assuming to grant licenses to parties to sell intoxicating liquors. (*Welsford v. Weidlein*, 23 K. 601.)

1026. The power to grant a license to carry on a dramshop, in a city of the third class, depends upon the petition of a majority of the residents of the city, of twenty-one years of age and over, both male and female; and if the city council grant a license, without the requisite petition, the action is void, and the mayor is not bound to sign any license so ordered. (*Welsford v. Weidlein*, 23 K. 601.)

1027. Where, in order to determine the amount of the verdict, the jury agreed that each juror should name the amount for which he was willing to give a verdict, and that the sum of these amounts should be divided by twelve, and that the quotient should be returned as the verdict, and this agreement was carried into effect, and the result reached in no other way and without any subsequent consideration or assent of the several jurors, *held*, that a verdict so made up and returned was improper, and must be set aside. (*Johnson v. Husband*, 22 K. 277; *Werner v. Edmiston*, 24 K. 147.)

1028. No notice is required to be given of a motion for a new trial, and on the hearing of such a motion the court may not refuse to hear an affidavit on the ground that it has not been filed before the motion is called for hearing. If the affi-

davit discloses unexpected testimony, the court may for good cause postpone the further hearing so as to give the opposing party time to produce counter testimony. (*Warner v. Edmiston*, 24 K. 147.)

1029. Sec. 16 of art. 2 of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," does not invalidate or render unconstitutional §§ 9 and 10 of the dramshop act. It is no defense to an action brought under these sections, that the intoxication was caused partially by liquor sold by other parties; it is enough if the liquor sold by the defendant was the direct cause, either in whole or in part, of the intoxication. (*Warner v. Edmiston*, 24 K. 147.)

1030. Where an action for the violation of a city ordinance is commenced and prosecuted to conviction and sentence before the police judge of such city, and the case is then taken by the defendant on appeal to the district court, the district court should, with reference to such case, take judicial notice of the incorporation of such city and of the existence and substance of its ordinances. (*Solomon City v. Hughes*, 24 K. 211.)

1031. Where the council of a city of the third class, at a meeting where all the members of the council and the mayor are present, take steps to pass a certain city ordinance, and afterward, at an adjourned meeting of said council, pass such ordinance, *held*, that the ordinance may be valid, notwithstanding the fact that no ordinance had previously been passed fixing the times for holding the regular meetings of the city council. And where the records of the city council show that the ordinance was as a whole, and each section thereof separately, adopted by a majority of all the members of the city council elected, and that there was no vote against the ordinance, or any part thereof, and that each section of the ordinance was considered separately, and that upon the adoption thereof the yeas and nays were taken, *held*, that the ordinance may be valid, although the records of the city council may not show in terms

that the yeas and nays were taken upon the final passage of the ordinance as a whole. (*Solomon City v. Hughes*, 24 K. 211.)

1032. A conviction for unlawfully giving or selling intoxicating liquor to a person in the habit of being intoxicated, cannot be sustained, unless the proof shows that the notice required to be given by § 6 of the dramshop act, informed the defendant, that the party to whom he is charged with furnishing liquor is in the habit of being intoxicated. (*State v. Gutekunst*, 24 K. 252.)

1033. It is the duty of the district courts to interfere of their own motion in all cases where counsel in argument in jury trials, state pertinent facts not before the jury, or use vituperation and abuse, predicated upon alleged facts not in evidence, calculated to create prejudice against a prisoner. (*State v. Gutekunst*, 24 K. 252.)

DECISIONS SINCE LAW OF 1881.

1034. The constitution provides that propositions for its amendment may be submitted to the people by the concurrence of two-thirds of the members of each house, that such propositions, together with the yeas and nays, shall be entered on the journal, and that if a majority of the electors voting on such proposed amendment adopt them, they shall become a part of the constitution. It also provides for a "general election" to be held annually on the Tuesday succeeding the first Monday in November. From early Kansas history, there has been in force a general-election law. It provides all the machinery for elections, names judges, canvassing boards, prescribes forms and procedure for the election of all officers—state, district, county and township. In terms, it names only individuals and officers, and does not refer to constitutional amendments or other questions. In 1879, the legislature, by the requisite vote, submitted a proposition to amend the constitution. This proposition was not entered at length upon the journal, but was described by its title, its scope and object. Otherwise, the submission was legal and regular. The joint resolution making the submission simply provides that the proposition shall be

submitted to the electors at the general election in 1880, and prescribes the form of ballots. It does not in terms declare that the machinery of the general-election law shall control, or that any particular officers or boards shall receive, count or canvass the votes cast. As a matter of fact, the full machinery of the general-election law was appropriated, votes were received, counted, canvassed, and the result declared, just as fully as though it had been in terms ordered. Further, the records of legislative action disclose that while, from 1861 to 1868, propositions for constitutional amendments were submitted, in which the machinery of the general-election law was specifically appropriated, and from 1868 to 1873 no propositions for constitutional amendments were submitted, yet that, from 1873 to the present time, four legislatures have submitted constitutional amendments, and that during these years the same form of submission has been observed as was used in this submission; that many of the propositions so submitted have been adopted, and, without question, recognized and acted upon as parts of the constitution; that among these changes are such vital ones as the numerical organization of the legislature, length of official terms, scope of revenue laws, and biennial sessions. Frequently, also, the full text of the proposed amendment did not appear upon the journal of either house, but, like the one in question, it was referred to only by the title and object. Beyond this, it is a matter of public history, that between the submission and the vote, a period of over twenty months, this proposition for amendment was the subject of a warm and heated canvass throughout the entire state, and no suggestion, even, was publicly made that the proposition was not fully and legally presented to the people for decision. At the election, seven out of every eight voters recorded, by ballot, their views upon the question, and a majority of these ballots was in favor of the adoption of the amendment. *Held,* That, conceding the irregularity in the proceedings of the legislature, and the doubtful scope of the provisions for the election, yet, in view of the very uncertainty as to those provisions, the

past legislative history of similar propositions, the universal prior acquiescence in the same forms of procedure, and the popular and unchallenged acceptance of the legal pendency before the people of the question of this amendment for decision, and also in view of the duty cast upon this court of taking judicial knowledge of everything affecting the existence and validity of any law or portion of the constitution, it must be, and it is adjudged, that such proposed amendment has become, and is, a part of the constitution. (*Constitutional Prohibitory Amendment Cases*, 24 K. 700.)

1035. When two or more propositions for constitutional amendment are submitted at the same election, either one will be adopted, if a majority of the electors voting upon it vote affirmatively; and this without reference to the number of votes cast on the other propositions, or at that election. (*Prohib. Amend. Cases*, 24 K. 700.)

1036. Notwithstanding the 14th amendment to the constitution of the United States, any state has the right to prohibit the manufacture and sale of intoxicating liquors for use as a beverage. (*Prohib. Amend. Cases*, 24 K. 700.)

1037. The constitutional amendment does not repeal the dramshop act *in toto*, but only so far as that act authorized licenses for the sale of intoxicating liquors as a beverage. (*Prohib. Amend. Cases*, 24 K. 700.)

1038. Where a complaint is filed under the dramshop act, which does not in terms charge a sale without a license, but charges generally an unlawful selling, and the defendant, pleading not guilty, goes to trial, is convicted and sentenced, *held*, that the complaint is not such an absolute nullity as will entitle the defendant to a discharge by *habeas corpus*. (*Prohib. Amend. Cases*, 24 K. 700.)

1039. The legislature has the power under the constitution to cast upon the person holding the office of judge of the probate court the duty of issuing permits or licenses for the sale of liquor, as provided in ch. 128 of the Laws of 1881. (*Intoxicating Liquor Cases*, 25 K. 751.)

1040. Said ch. 128, so far as it purports to regulate the sale of liquor for medical and other purposes, is not in conflict with the constitution because it restricts the right to sell to druggists. (*Intoxicating Liquor Cases*, 25 K. 751.)

1041. While in order to determine the true scope and meaning of a statute, its letter is to be first examined and considered, yet courts should also have regard to the evil sought to be remedied, for that which is within the letter though not within the spirit of the statute, is not in legal contemplation a part of it. (*Intoxicating Liquor Cases*, 25 K. 751.)

1042. The evil sought to be remedied by said ch. 128 is the use of intoxicating liquors as a beverage. This purpose interprets the law. (*Intoxicating Liquor Cases*, 25 K. 751.)

1043. Whatever is generally and popularly known as intoxicating liquor, such as whisky, brandy, gin, etc., is within the prohibitions and regulations of the statute, and may be so declared as matter of law by the courts. (*Intoxicating Liquor Cases*, 25 K. 751.)

1044. Whatever, on the other hand, is generally and popularly known as medicine, an article for the toilet, or for culinary purposes, recognized, and the *formula* for its preparation prescribed, in the United States Dispensatory, or like standard authority, and not among the liquors ordinarily used as intoxicating beverages, such as tincture of gentian, paregoric, bay rum, cologne, essence of lemon, etc., is without the statute, and may be so declared as matter of law by the courts, and this notwithstanding such articles contain alcohol, and in fact, and as charged, may produce intoxication. (*Intoxicating Liquor Cases*, 25 K. 751.)

1045. As to articles intermediate these two classes, articles not known to the United States Dispensatory, or other similar standard authority, compounds of intoxicating liquors with other ingredients, whether put up upon a single prescription and for a single case, or compounded upon a given *formula* and sold under a specific name, as bitters, cordials, tonics, etc., whether they are within or without the statute, is a question of fact for

a jury, and not a question of law for a court. The rule or test is this: if the compound or preparation be such that the distinctive character and effect of intoxicating liquor are gone, that its use as an intoxicating beverage is practically impossible, by reason of the other ingredients, then it is outside the statute. But if, on the other hand, the intoxicating liquor remain as a distinctive force in the compound, and such compound is reasonably liable to be used as an intoxicating beverage, then it is within the statute. (*Intoxicating Liquor Cases*, 25 K. 751.)

1046. In a criminal prosecution against K., under § 3 of the dramshop act of 1868 (Comp. Laws of 1879, p. 386), for selling intoxicating liquor without taking out or having a license for that purpose, the defendant pleaded not guilty. Afterward, and upon the trial, the defendant admitted that he sold the intoxicating liquor at the time and place charged in the complaint; *held*, that it then devolved upon the prosecution to show that the defendant did not have a license authorizing him to sell intoxicating liquor. (*State v. Kuhuke*, 26 K. 405.)

1047. The said intoxicating liquor was sold in a city of the third class, and the defendant at the trial introduced a license in evidence, in due form and executed by the proper officers of said city, authorizing him to sell intoxicating liquor in said city; *Held*, That said license was *prima facie* valid; but if in fact void, it devolved upon the prosecution to show its invalidity. (*State v. Kuhuke*, 26 K. 405.)

1048. A civil action may be maintained by the state on the druggists' bond provided for in § 2, of ch. 128 of the Laws of 1881, for a breach thereof, without any previous criminal prosecution or conviction of the principal therein. (*State v. Pierce*, 26 K. 777.)

1049. The action of the law making power must in all cases be upheld, unless its action is manifestly in contravention of the constitution. (*State v. Barrett*, 27 K. 213.)

1050. No slight difference of opinion will authorize the judiciary to set aside the action of the law making power, or to nullify an act of the legislature. But where an act of the legis-

lature, or a portion of the act, is clearly unconstitutional, it is the duty of the courts to so declare, and to hold the unconstitutional provision or provisions null and void. Sec. 16, art. 2 of the constitution must be liberally construed. (*State v. Barrett*, 27 K. 213.)

1051. Under this provision of the constitution, the title of an act may be as broad and comprehensive as the legislature may choose to make it; or it may be as narrow and restricted as the legislature may choose to make it. It may be so broad and comprehensive as to include innumerable minor subjects, provided all these minor subjects are capable of being so combined and united as to form only one grand and comprehensive subject; or it may be so narrow and restricted as to include only the smallest and minutest subject. (*State v. Barrett*, 27 K. 213.)

1052. And while the title to an act may include more than one subject, provided all can be so united and combined as to form only one single, entire, but more extended subject; yet, neither the title to the act nor the act itself can contain more than one subject, unless all the subjects which it contains can be so united and combined as to form only one single subject. (*State v. Barrett*, 27 K. 213.)

1053. In construing the title to an act as well as the act itself, reference must be had to the object of the act, and to the evil sought to be remedied by it. (*State v. Barrett*, 27 K. 213.)

1054. It is not necessary that the title to an act should be a synopsis or abstract of the entire act in all its details; it is sufficient if the title indicates clearly, though in general terms, the scope of the act. (*State v. Barrett*, 27 K. 213.)

1055. Where a section of an act is assailed as being in contravention of said provisions of § 16, art. 2 of the constitution, it is sufficient if it is germane to the single subject expressed in the title and included therein, provided the act itself does not contain more than this single subject. (*State v. Barrett*, 27 K. 213.)

1056. Where the title to an act is not broad enough to include everything contained in the act, that which is not included within the title must be held to be invalid, for such is evidently the manifest intention of the constitution; and the courts have no power to enlarge or extend or amplify the title to the act, any more than they have to enlarge or diminish or modify or change the act itself. (*State v. Barrett*, 27 K. 213.)

1057. Where an act contains two separate and independent subjects, having no connection with each other, and the title to the act is broad enough to cover both, *held*, that probably, as a general rule, the act is unconstitutional and void. (*State v. Barrett*, 27 K. 213.)

1058. The defendant was prosecuted criminally under § 19, ch. 128 of the Laws of 1881, p. 243. Sec. 16, art. 2 of the constitution provides as follows: "No bill shall contain more than one subject, which shall be clearly expressed in its title." The title to the act in controversy reads as follows: "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." Said § 19 reads as follows: "Sec. 19. It shall be unlawful for any person to get intoxicated; and every person found in a state of intoxication shall, upon conviction thereof before any justice of the peace, be fined in the sum of five dollars, or be imprisoned in the county jail not exceeding ten days." The complaint upon which the defendant was prosecuted reads as follows: "S. S. K., county attorney, of lawful age, being duly sworn, on his oath says, that, at the county of Wilson and state of Kansas, on, to wit, the 9th day of June, 1881, one J. J. B. did then and there unlawfully and wrongfully get intoxicated, and was found in a state of intoxication, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Kansas." *Held*, That said § 19, so far as it has any application to this case, is unconstitutional and void, being enacted in contravention of § 16, art. 2 of the constitution. (*State v. Barrett*, 27 K. 213.)

1059. Where an information is filed within twenty days preceding a term of court, the clerk may issue a warrant thereon as soon as practicable after the filing of the information. (*State v. Schweiter*, 27 K. 499.)

1060. Where the court has failed to fix the amount of bail of a defendant arrested upon a warrant issued upon an information, and there is no district judge in the county, the clerk of the district court may fix the bail of the defendant. (*State v. Schweiter*, 27 K. 499.)

1061. Where the statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as constituting all together one offense only. In such cases, the offender may be informed against as for one combined act in violation of the statute, and proof of either of the acts mentioned in the statute and set forth in the information will sustain a conviction. (*State v. Schweiter*, 27 K. 499.)

1062. In the case of misdemeanor, the joinder of several offenses will not in general vitiate the information in any stage of the prosecution. For offenses inferior to felony, the practice of quashing the information on account of such joinder, or calling the prosecutor to elect on which charge he will proceed, does not prevail. (*State v. Schweiter*, 27 K. 499.)

1063. The defendant was charged in the information, under the terms of ch. 128, Laws of 1881, that, without taking out and having a permit to sell intoxicating liquors, he did unlawfully sell and barter spirituous, malt, vinous, fermented and other intoxicating liquors, contrary to the statute in such case made and provided. The defendant moved the court to compel the county attorney to elect whether he would prosecute the defendant for *selling* or for *bartering* the liquors set out in the information; second, to compel the county attorney to elect

what specific kind of liquor he would prosecute the defendant for selling. The court overruled the motion. *Held*, Not error, as the motions were not well taken. An information in such a case may pursue the language of the statute, charging the commission of the several acts conjunctively, as constituting altogether one offense. (*State v. Schweiter*, 27 K. 499.)

1064. Where the information contains but one count, and the defendant is charged therein with an illegal sale of intoxicating liquors, a single issue is formed which it is the province of the jury to determine according to the evidence, under the instructions of the court; but the court in its discretion may permit the prosecutor, after offering evidence of a particular sale which would sustain the charge in the information, to offer also evidence tending to prove several other distinct sales. Yet after all the evidence of the distinct offenses has been introduced by the prosecution, it is the duty of the court, upon motion, to require the prosecutor, before the defendant is put on his defense, to elect upon what particular transaction he will rely for a conviction. (*State v. Schweiter*, 27 K. 499.)

1065. Sec. 16 art. 2 of the constitution, which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title, does not invalidate or render unconstitutional § 21 of the prohibitory law of 1881, to prohibit the manufacture and sale of intoxicating liquors. Sec. 21, ch. 128, L. 1881, is not in violation of § 10 of the bill of rights of the state constitution. (*State v. Schweiter*, 27 K. 499.)

1066. Sec. 21, ch. 128, Laws of 1881, is not a violation of § 10 of the bill of rights of the state constitution. (*State v. Schweiter*, 27 K. 499.)

1067. Where a person is charged under § 7, ch. 128, Laws of 1881, with selling and bartering intoxicating liquors without taking out and having a permit therefor, it is unnecessary to state in the information the name of the person to whom the liquors were sold and bartered. (*State v. Schweiter*, 27 K. 499.)

1068. No material averment in an information which is denied by the defendant is taken as true, but it must be proved

in some manner by the prosecution. (*State v. Schweiter*, 27 K. 499.)

1069. Where a defendant was charged in the information with selling intoxicating liquors on the 23d day of September, 1881, without taking out and having a permit to sell the same, and the probate judge of the county where the offense was alleged to have been committed was put on the witness stand at the trial, and testified that he was holding the office of probate judge of that county, that he had occupied that position for five or six years, that he was acquainted with the defendant, and that he had never issued any permit to him to sell intoxicating liquors, or liquors of any kind, *held*, this was *prima facie* evidence of the truth of the averment that the defendant had no permit. (*State v. Schweiter*, 27 K. 499.)

1070. On June 8, 1877, the city of Ottawa, a city of the second class, passed an ordinance regulating and restraining the sale of intoxicating liquors. This ordinance provided for the issuing of licenses upon certain conditions to persons to sell intoxicating liquors, and also provided for the punishment of all persons who should sell intoxicating liquors without a license, or in violation of law and of the city ordinance. *Held*, That such ordinance was valid at the time of its passage. (*Franklin v. Westfall*, 27 K. 614.)

1071. Afterward, the constitution and statutes were so amended as to prohibit cities of the second class from issuing licenses for the sale of intoxicating liquors; but the following statutes are still in force, providing that each city of the second class may pass "ordinances not repugnant to the constitution and laws of this state, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect;" and also "to enact ordinances to restrain, prohibit and suppress tippling shops, . . . disorderly houses and practices, . . .

and all kinds of public indecencies;" and also to enact "all such ordinances, by-laws, rules and regulations, not inconsistent with the laws of the state, as may be expedient for maintaining the peace, good government and welfare of the city, and its trade and commerce;" and the statutes still provided for enforcing ordinances of cities of the second class by prosecutions before the police judge, and by fine and imprisonment. *Held*, That while the said ordinance of the city of Ottawa, so far as it authorized the granting of licenses to sell intoxicating liquors, has been impliedly repealed by subsequent provisions of the constitution and statute, still, that the remainder of the ordinance, which provides for punishing persons for selling intoxicating liquors in violation of law and in violation of the ordinance, and without having any license or permit therefor, has not been repealed by implication or otherwise, but is still in force. (*Franklin v. Westfall*, 27 K. 614.)

1072. In an information under ch. 128, Laws of 1881, it is unnecessary to state the kind or the class of the liquor, but it is sufficient to charge that the defendant sold intoxicating liquors at the time and place. (*State v. Sterns*, 28 K. 154.)

1073. Where the information described the place of the offense as a "certain wooden building known as the Belmont House, situated on fractional lots 14, 15 and 16, in block 24, in the city of Parsons," and the testimony abundantly showed that there was such a building known as the Belmont House in the city of Parsons, and that the defendant was carrying on business there, and there was no testimony tending to show that there were two places known by that name in that city, *held*, that the court did not commit any error affecting the substantial rights of the defendant in permitting, pending the trial, the prosecutor to strike from the information the words, "situated on fractional lots 14, 15 and 16, in block 24." (*State v. Sterns*, 28 K. 154.)

1074. An information charging M. and S. with unlawfully selling intoxicating liquors is equivalent to a charge that each of them is guilty of so selling, and under such an information,

where S. is tried separately, he may be convicted, although the testimony fails to show that M. had any connection with the selling. (*State v. Sterns*, 28 K. 154.)

1075. Where M. and S. were charged in one information with unlawfully selling liquors, and S. being tried separately is shown to have sold liquor at the time and place named, and there is no testimony tending to show that he was acting as the agent or employé of M., the court did not err in refusing an instruction to the effect that a permit to M. to sell liquor would be a protection to S. if S. was acting as his agent or employé. (*State v. Sterns*, 28 K. 154.)

1076. Where the defendant in a criminal action takes an appeal from the judgment of a district court to the supreme court, he must file in the supreme court a transcript of the proceedings of the district court, certified to by the clerk of that court. (*State v. Lund*, 28 K. 280.)

1077. Where the defendant in a criminal action files in this court a record, certified by the clerk of the district court to be a copy of the bill of exceptions only, the supreme court cannot reverse the judgment of the district court or examine the alleged errors presented in the brief filed for the defendant, although the bill of exceptions purports to copy the information, orders and judgment of the district court. (*Whitney v. Harris*, 21 K. 96; *Lauer v. Livings*, 24 K. 273; *State v. Lund*, 28 K. 280.)

1078. A certificate of the district clerk that a record brought to the supreme court is a copy of the original bill of exceptions in the case as appears of record and on file in his office, is not a correct authentication of a transcript of the proceedings of a criminal action tried in the district court. (*State v. Lund*, 28 K. 280.)

1079. The remedy given by § 13, ch. 128, of the Laws of 1881, providing for shutting up and abating all places where intoxicating liquors are manufactured, sold, bartered, or given away, in violation of law, is a criminal proceeding, and not a civil action. (*State ex rel. v. Crawford*, 28 K. 743.)

1080. A drinking saloon in which intoxicating liquors are sold repeatedly, continuously and persistently, in utter violation and defiance of the constitution and statutes of the state, and are sold to be drunk on the premises as a beverage, is a public nuisance; and this is so, not merely because of the express provisions of the statute declaring such places to be nuisances, (§ 13 of the prohibitory act of 1881,) but it is also so from the necessary implications of the statute, and by the indirect force of the statutes, which make the keeping of the saloon, and the consummation of each sale of intoxicating liquors, criminal offenses; and it is so because of the repeated, continuous and persistent violation of the statutes. Such a nuisance may be "shut up and abated" under the provisions of said section 13 of the prohibitory act of 1881; but it cannot ordinarily be perpetually enjoined by a court of equity; and this want of power in a court of equity is not because of the fact that the keeping of the saloon is a criminal offense, and involves the commission of many criminal offenses, but because the statute (said § 13) affords another complete and adequate remedy. (*State ex rel. v. Crawford*, 28 K. 726.)

1081. Where a motion is filed to require a petition to be more definite and certain on various grounds therein alleged, and some of the grounds are sustained and a new or substituted petition is thereafter filed by the plaintiff, which is not attacked by motion or otherwise, and to which an answer is filed and the issues settled, the defendant cannot insist as error upon the defects for indefiniteness and uncertainty in the original petition. (*Jockers v. Bergman*, 29 K. 109.)

1082. Where an action was brought under § 10, ch. 85, Comp. Laws of 1879, and the statute was repealed prior to trial by ch. 128, Laws of 1881, but said ch. 128 embraced in § 15 thereof all of the provisions of said § 10, ch. 35, *held*, under subd. 1 of § 1, ch. 104, Comp. Laws of 1879, § 15 of ch. 128 must be construed as a continuation of the provisions of said § 10, ch. 35, and that therefore the repeal of said ch. 35

did not destroy or affect the right of action existing under § 10, ch. 35. (*Jockers v. Bergman*, 29 K. 109.)

1083. Sec. 16 of art. 2 of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," does not invalidate or render unconstitutional § 15 of ch. 128, Laws of 1881. (*Jockers v. Bergman*, 29 K. 109.)

1084. In an action brought by the wife against a party under the civil-damage statute for causing the intoxication of her husband, a witness testified that the husband and he had taken drinks together at the defendant's saloon, but he could not say the husband had taken drinks there within the last two and a half years. Thereupon the counsel of plaintiff asked, "What is your best recollection with regard to whether or not you have seen the husband drink at defendant's saloon within the last two and a half years before he went away?" *Held*, The question was competent, and that it did not seek to obtain of witness his opinion merely. (*Jockers v. Bergman*, 29 K. 109.)

1085. In an action brought by the wife against a party under the civil-damage statute for causing her husband to be intoxicated, as affecting the question of exemplary damages, it is competent to offer evidence that the sales or gifts of intoxicating liquors were made against the plaintiff's remonstrance, or after her notice not to sell, and proof of such remonstrance or notification may be given, although it was made more than two years prior to the commencement of the action. (*Jockers v. Bergman*, 29 K. 109.)

1086. In such an action it is competent to offer evidence that the husband is an habitual drunkard, and the jury may consider this fact among others, if the wife has been injured in her means of support by the defendant in selling or giving to her husband intoxicating liquors. (*Jockers v. Bergman*, 29 K. 109.)

1087. Where, in such an action, evidence had been introduced tending to prove that the husband had no means of sup-

port for his family, excepting his own labor; that owing to his intoxication he had neglected his business and did not support his wife, as he ought to have done, and could have done if he had been sober, and that she had become an object of public charity, an instruction that the wife was entitled to recover for any actual damage to her means of support, caused in whole or in part by liquor sold to her husband by the defendant, causing his intoxication, was based upon sufficient evidence. (*Jockers v. Bergman*, 29 K. 109.)

1088. Where a wife voluntarily signed a petition for a person applying for a dramshop license, she did not thereby consent that the party obtaining the license under the petition should sell intoxicants unlawfully, or in violation of the statute; and such action on her part is no bar to an action brought by her against the dramshop keeper under the civil-damage statute, for causing the intoxication of her husband, nor is evidence of such fact competent in mitigation. (*Jockers v. Bergman*, 29 K. 109.)

1089. In such an action, where the husband is an habitual drunkard, and has been under the influence of liquor most of the time for two years before the action was commenced, the refusal of an instruction that "If the jury find from the evidence the defendant sold plaintiff's husband intoxicating liquors at a time when he was sober, and that at such times he did not become intoxicated, they should not consider such sales in determining the amount of plaintiff's recovery," is not error. It is enough if the liquors sold by the defendant were the direct cause, either in whole or in part, of the intoxication. (*Jockers v. Bergman*, 29 K. 109.)

1090. The civil damage statute expressly authorizes the recovery of damages coëxtensive with the injury, and likewise exemplary damages. But exemplary damages are not to be allowed under the act, unless the conduct of the defendant is willful, wanton, reckless, malicious, oppressive, or otherwise deserving of condemnation beyond the mere actual damage. Evidence, however, that the defendant sold intoxicating liquors

to a person who was in the habit of being intoxicated, after notice from the wife not to sell, and that he sold intoxicating liquors to such person while in a state of intoxication, are grounds of exemplary damages. (*Jockers v. Bergman*, 29 K. 109.)

1091. In 1877 the defendant erected a brewery, and has since operated the same in manufacturing beer, an intoxicating liquor. In 1881, after the taking effect of both the constitutional amendment relating to intoxicating liquors, and the present prohibitory liquor act, (Laws of 1881, ch. 128,) the defendant manufactured beer, and also sold beer without having any permit giving him any authority to do either. The sale, however, was of beer which he had manufactured prior to the taking effect of the said prohibition act. *Held*, That the said prohibition act is not unconstitutional; but that it is constitutional and valid so far as it affects the defendant; and that the defendant committed a public offense, both in the manufacture of the beer, which he manufactured after the taking effect of the prohibition act, and in the sale of the beer, which he sold after the taking effect of such act. (*State v. Mugler*, 29 K. 252.)

1092. An information alleging that "at the time and place stated, the defendant did unlawfully sell, barter and give away spirituous, malt, vinous, fermented and other intoxicating liquors, for other than medical, scientific and mechanical purposes, contrary to the statute in such cases made and provided," charges an offense under the provisions of ch. 128, Laws of 1881. (*State v. Shackle*, 29 K. 341.)

1093. Where a defendant, who is charged with selling intoxicating liquors prohibited by the provisions of ch. 128, Laws of 1881, admits upon the trial that at the time and place stated in the information he sold whisky for other than medical, mechanical or scientific purposes, his admissions are sufficient to sustain a finding of guilty. (*State v. Shackle*, 29 K. 341.)

1094. Sec. 3 of ch. 128, Laws of 1881, is not rendered invalid by reason of § 16, art. 2, of the state constitution, which provides that "no bill shall contain more than one subject,

which shall be clearly expressed in its title." (*State v. Curtis*, 29 K. 384.)

1095. A complaint was filed before a justice of the peace, charging the defendant with a violation of said § 3. Upon trial he was convicted, and from such conviction appealed to the district court. In the latter court the county attorney filed an information for the same offense, stating at the time that he did not intend to prosecute further the case appealed from the justice, and thereafter dismissed such case. After the dismissal of that case the defendant filed a plea in abatement to the information, on the ground of the proceedings in the former case. Such plea was overruled; *held*, no error. (*State v. Curtis*, 29 K. 384.)

1096. O. was tried under an information of twenty-one counts, each charging an unlawful sale of intoxicating liquors. He was found guilty on the first four counts, and fined. The judgment reversed, on authority of *State v. Schwoeiter*, 27 K. 499, sixth paragraph of syllabus, *per curiam*. (*State v. Olferman*, 29 K. 502.)

1097. Where two defendants are jointly charged in one information, with a misdemeanor, and being refused a separation are put on trial together, each is entitled to the same number of peremptory challenges he would be entitled to if tried separately. (*State v. Durein*, 29 K. 688.)

1098. Where the record, not setting forth in detail the proceedings in impaneling the jury, simply states that the defendants each demanded that they be allowed four peremptory challenges, which demand the court refused, and ruled that they were both entitled in the aggregate to four and no more, and that in the selection of the jury the defendants used four peremptory challenges, and contains no other statement or recital in reference thereto, and upon the trial one of the defendants was found guilty, and as to the other the jury disagreed, *held*, by a majority of this court, upon appeal by the defendant convicted, that the record sufficiently shows that he was not allowed his full right of challenge. (*State v. Durein*, 29 K. 688.)

1099. *Per curiam*: Full right of challenge was not allowed in trial court. (*State v. Durein*, 29 K. 688; *State v. Hebrank*, 29 K. 693.)

1100. The amount of recovery for the breach of a druggist's bond, given under § 2 of the prohibition act of 1881, is the amount which the state loses by reason of the breach of such bond, and is not necessarily the full amount of the penalty of the bond. This amount of recovery would generally include the amount of the costs and expenses necessarily incurred in the prosecution of the druggist for his violation of the law, together with the costs and expenses necessarily incurred in enforcing the judgment, whether the judgment should be for a fine or for imprisonment, and also the fine itself, if that should be imposed upon the druggist. Therefore, where a druggist sells intoxicating liquor in violation of the prohibition act, and thereby commits a breach of his bond, and he is prosecuted criminally for the violation of such act, and a fine and costs are imposed upon him, but no judgment is rendered subjecting him to any imprisonment, and he immediately pays the amount of the fine and costs, *held*, that no action will afterward lie against the druggist and his sureties for such breach of his bond; and this for the reason that the full amount of the loss to the state, incurred by reason of the breach of the bond, has been fully paid and satisfied. (*State v. Estabrook*, 29 K. 739.)

1101. The defendant was prosecuted criminally for selling spirituous, malt, vinous, fermented and other intoxicating liquors, without having a permit therefor from the probate judge of the county. Upon the trial it was shown that the defendant sold such liquors as the clerk and managing agent of his wife, who owned the drug store in which the liquors were sold, and who had a druggist's permit to sell intoxicating liquors, issued by the probate judge of the county. *Held*, That the defendant is not liable. (*State v. Hunt*, 29 K. 762.)

1102. A criminal information charged that the defendant "willfully and knowingly and unlawfully sold, bartered and gave away spirituous, malt, vinous, fermented and other intox-

icating liquors, for other purposes than for medical, scientific and mechanical purposes, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas." *Held*, That the information charged a public offense, notwithstanding the fact that it did not state that the defendant did not as a druggist sell the liquors above mentioned to some other druggist. (*State v. Shackle*, 29 K. 341; *State v. Hunt*, 29 K. 762.)

1103. It is within the discretion of the court to permit the name of a witness known to the prosecuting attorney at the time of the filing of the information, to be indorsed thereon after the commencement of the trial, and to permit such witness to testify on the part of the state in a criminal prosecution over defendant's objection. (*State v. Cook*, 30 K. 82.)

1104. In a criminal prosecution against a defendant for selling intoxicating liquors without taking out or having a permit, the county attorney testified that he was acquainted with the probate judge of the county; that he understood he was absent from home; that the book which he produced was the journal of permits kept by the probate judge; that it contained all the druggists' permits issued by the probate judge; that he had looked into the other journals kept by the probate judge, and had been unable to find any record of permits therein; that he had frequently heard the probate judge testify in liquor cases that all the records of permits were kept in the book produced by him; that the probate judge had another journal in which he kept the record of the business of his court; that he went into the office of the probate judge and got the book when the judge was not there; that there were other journals in his office; that the book contained nothing but blanks for recording druggists' permits; and thereupon, against the objection of the defendant, the court permitted such book or journal of permits to be introduced in evidence. *Held*, Error. (*State v. Cook*, 30 K. 82.)

1105. Where a party is arrested and brought before a justice of the peace, charged with the commission of a misdemeanor

of which the justice of the peace and the district court have concurrent original jurisdiction, the defendant has a right to demand a trial before the justice of the peace, and the state has no right to elect to treat the proceeding before the justice of the peace as a mere preliminary examination, and have the party committed for a final trial at the next term of the district court. (*In re Donnelly*, 30 K. 191.)

1106. The service of a notice of appeal on the clerk and prosecuting attorney, in a criminal action brought to this court by the defendant, is an important part of the record and constitutes a necessary step in the appeal, and should appear in the transcript filed, that this court may see and its record show it has jurisdiction of the cause. (*Carr v. The State*, 1 K. 334; *The State v. King*, 1 K. 466.) If it does not appear in the transcript, satisfactory proof must be presented to this court of the service of the notice of appeal upon the clerk and prosecuting attorney; or notice of appeal must be waived by them, in order that this court may take jurisdiction of the case. (*State v. Teissedre*, 30 K. 210.)

1107. Where a party is arrested and brought before a justice of the peace, charged with the commission of a misdemeanor, of which the justice of the peace and the district court have concurrent and original jurisdiction, the defendant has a right to demand a trial before the justice of the peace, and the state has no right to elect to treat the proceedings before the justice of the peace as a mere preliminary examination, and have the party committed for a final trial at the next term of the district court. (*In re Donnelly*, 30 K. 424.)

1108. And the foregoing is true, even where the defendant is charged in twenty or more different counts of the same complaint with the commission of twenty or more such misdemeanors; and it is also true, even where the aggregate amount of the punishment as fixed by law for that number of such misdemeanors, if the separate punishments were added together, would far exceed the amount of punishment which a justice of

the peace can legally impose upon any party for the commission of any single misdemeanor. (*In re Donnelly*, 30 K. 424.)

1109. In a criminal prosecution in the district court, where a judgment is rendered against the defendant for a fine and costs only, and the defendant appeals to the supreme court, the appeal is not so completed and perfected as to stay proceedings in the district court, until proper notices of the appeal have been given, and a transcript of the case has been filed in the supreme court. (*In re Chambers*, 30 K. 450.)

1110. A complaint was filed on the 20th day of January, 1882, before a justice of the peace, charging the defendant, in general terms, with selling, on January 18, 1882, intoxicating liquors unlawfully. Trial was had on February 4, 1882, and the defendant was acquitted. Upon the trial the county attorney was not required to elect, and did not elect, to rely upon any particular sale. Thereafter, and on May 4, 1882, an information was filed, charging the same defendant, in general terms, with selling, on April 29, 1882, at the same place, intoxicating liquors unlawfully. In the trial upon the information, after all the testimony of the state had been presented, the county attorney elected to rely for a conviction upon a sale made to one V. There was some evidence tending to prove that the sale to V. was made prior to January 20, 1882, and before the filing of the first complaint. Thereupon the defendant, with the leave of the court, pleaded his former acquittal in bar of the second prosecution. The evidence introduced established that V. was not a witness at the prior trial, and that the transaction between him and the defendant was not presented to the court or considered by the jury upon that trial. *Held*, That the mere fact that the evidence tended to show the offense alleged in the information was committed before the filing of the first complaint was no bar; and *further held*, as the testimony introduced on the second trial established that the defendant was not acquitted upon the prior trial for any sale made to V., and that no evidence was offered on that trial concerning any such sale, the former acquittal of the defendant

was no bar to his subsequent prosecution. (*State v. Kuhuke*, 30 K. 462.)

1111. An appeal in a criminal case from the district court to the supreme court is not completed and perfected until a transcript of the case is filed in the supreme court. (*In re Chambers*, 30 K. 450.) And hence, where a defendant desires to appeal in such a case from the district court to the supreme court, he may continue to give notices of the appeal until he has finally completed and perfected his appeal by giving proper notices, and by filing a transcript of the case in the supreme court, within thirty days after the giving of the last notices of appeal, provided the appeal is taken within two years after the judgment is rendered. (*State v. Teissedre*, 30 K. 476.)

1112. Sec. 13 of the prohibitory liquor law is not unconstitutional or void. (*State v. Teissedre*, 30 K. 476.)

1113. In a criminal prosecution, under § 13 of the prohibitory law, where the defendant is charged with keeping and maintaining a common nuisance, the information is not fatally defective "because it does not charge that the defendant had no permit or license to sell" intoxicating liquors. The defendant may be guilty of such offense, and still have a permit or license to sell intoxicating liquors. (*State v. Teissedre*, 30 K. 476.)

1114. Where a defendant is charged, under § 13 of the prohibitory liquor law, with keeping and maintaining a common nuisance, evidence tending to show that the defendant sold intoxicating liquors, without having any permit to sell the same, tends to prove the offense charged, and is competent. (*State v. Teissedre*, 30 K. 476.)

1115. It is not error, in a criminal prosecution, for the district court to permit the county attorney to indorse the names of additional witnesses upon the information, and then to allow such witnesses to testify in the case, the court exercising a sound judicial discretion in permitting the same to be done. (*State v. Teissedre*, 30 K. 476.)

1116. It is not error, where the court exercises a sound judicial discretion, to permit a criminal case to be opened during

the closing argument of the counsel for the defense, and to permit the state to prove in what county and state the alleged offense was committed. (*State v. Teissedre*, 30 K. 476.)

1117. It is not error for the trial court to instruct the jury "that beer is presumed to be intoxicating until the contrary is proved." In the absence of evidence to the contrary, beer will always be presumed to be an intoxicating liquor. (*State v. Teissedre*, 30 K. 476.)

1118. Where the instructions given by the trial court to the jury are not brought to the supreme court, the supreme court cannot tell whether the trial court erred, or not, in refusing to give certain instructions. (*State v. Teissedre*, 30 K. 476.)

1119. A criminal case is brought to this court only in the manner prescribed by statute. The statute prescribes a transcript of the record; hence an original bill of exceptions is insufficient. But where the clerk, certifying to the original bill, certifies that it contains true and correct copies of the information, verdict, judgment, etc., as to such matters, it must be treated as a transcript, and all allegations of error predicated thereon are open to examination. (*State v. Nickerson*, 30 K. 545.)

1120. The *gravamen* of the offense described in § 13 of the prohibitory law of 1881 is, that the party charged is the owner or keeper of a place in which intoxicating liquor is sold or kept for sale in violation of the statute; and this irrespective of who may be the owner or keeper of the liquor. Hence, an information to be good under such section must directly and positively charge the existence of such place, describing it, and that the defendant is the owner or keeper thereof. A charge that in a certain building the defendant sold and kept for sale intoxicating liquor is not sufficient under such section. Such a charge is, however, sufficient under § 7. (*State v. Nickerson*, 30 K. 545.)

1121. Where it appears from the testimony that a club exists, which is the owner or keeper of a stock of liquor, and that one of the rules is that no liquor is to be sold except to a mem-

ber of the club; that defendant is a member of such club, and that through his instrumentality liquor is sold to one not a member of the club: *Held*, That a verdict finding defendant guilty of a violation of the law cannot, in view of the provisions of §17, be declared unwarranted by the evidence. (*State v. Nickerson*, 30 K. 545.)

1122. Incorporated cities in this state have no power to license or impose a license tax on the business of selling intoxicating liquors contrary to the provisions of the constitution and the statute; and if a city assume such unlawful corporate power, it may be ousted from the exercise thereof by proceedings in the nature of *quo warranto*. (*State v. City of Topeka*, 30 K. 653.)

1123. "Original jurisdiction in proceedings in *quo warranto*" is conferred upon the supreme court by the state constitution (art. 3, §3). This jurisdiction so conferred is just what was understood to be *quo warranto* jurisdiction at the time when the constitution was adopted. This jurisdiction cannot be abolished, or increased, or decreased, by the legislature. (*State ex rel. v. Wilson*, 30 K. 661.)

1124. The legislature has power indirectly to affect the exercise of this jurisdiction, as it has the power directly or indirectly to affect almost every other matter or thing coming within the purview of the constitution. It may increase, or diminish, or create, or destroy particular instances in which this jurisdiction may be exercised; but it cannot increase, or diminish, or abolish, or destroy the jurisdiction itself. Thus, it may create additional offices or additional grounds for forfeiture, and thereby increase the number of instances in which the court may exercise its jurisdiction; or it may abolish some of the offices already existing, or some of the grounds for forfeiture already existing, and thereby diminish the number of instances in which the court may exercise its jurisdiction. (*State ex rel. v. Wilson*, 30 K. 661.)

1125. The supreme court has ample jurisdiction to oust any person from office who is holding the same without any sufficient

right thereto, and this whether the office has been usurped, or whether the incumbent's term of office has expired by lapse of time, or whether the incumbent has forfeited his right to hold the office any longer by reason of some official misconduct on his part; and it has jurisdiction to oust the incumbent from office where he is holding the same without right, although the question of his right to hold the office, or the question of forfeiture, if that is the case, has never before been presented to any court for judicial determination. The court may determine for itself the question of right, or of forfeiture. (*State ex rel. v. Wilson*, 30 K. 661.)

1126. But before the court can oust an officer from his office, it must be judicially determined that he has no right to hold the same; and if the alleged ground for ousting the officer is that he has forfeited his office by reason of some acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions of themselves work a forfeiture of the office. Mere misconduct, if it does not itself work a forfeiture, is not sufficient. The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the action is commenced. (*State ex rel. v. Wilson*, 30 K. 661.)

1127. The present action is an action in the nature of *quo warranto*, commenced originally in the supreme court by the county attorney of Shawnee county, Kansas, to oust the defendant from the office of mayor of the city of Topeka, a city of the first class, on account of certain alleged acts and omissions on the part of the defendant affecting the due enforcement of the prohibitory liquor law, a certain prohibitory liquor ordinance, and certain laws and ordinances relating to liquor saloons, bawdy houses, and gambling houses. The defendant has never been tried, or convicted, or removed from his office, nor has his office been declared forfeited, because of any of these things. *Held*, That in fact the defendant had not forfeited his office under any of the statutes of Kansas, so that he may

be ousted therefrom by the supreme court in the present action; and *especially held*, that he has not forfeited his office under §11, subd. 36, and §§ 99, 104 of the first class city act (Laws 1881, ch. 37), § 213, in connection with §§ 207-209, of the crimes act (Comp. Laws of 1879, ch. 31); and § 12 of the prohibitory liquor law of 1881 (Laws of 1881, ch. 128). Said §11, subd. 36, simply provides for the removal of city officers by the city itself; and the defendant has not been removed under this section and subdivision, nor under any other provision of the statutes. Said § 99 does not apply under the facts of this case. Before the mayor can be held to have forfeited his office under said §§ 104 and 213, he must not only have committed the misconduct therein referred to but he must also be tried before a criminal court, where he must be proved to be guilty beyond all reasonable doubt, and he must be found guilty and sentenced; and the forfeiture of his office will then follow such prosecution, trial, conviction and sentence, and *as a part of the punishment* for the misconduct of which he is found guilty. It is not merely the misconduct, however, the acts or omissions of themselves which create the forfeiture; but it is the acts or omissions, the trial, conviction and sentence before the criminal court, that work the forfeiture. What has been said with reference to §§ 104 and 213 will also apply to §12; and further, said §12 does not seem to include the mayor. (*State ex rel. v. Wilson*, 30 K. 661.)

1128. The legislature may provide for a forfeiture of office for misconduct, independent of any criminal prosecution, or other prosecution, and the legislature often does so provide; but it has not so provided in the present case. (*State ex rel. v. Wilson*, 30 K. 661.)

1129. If the defendant has in fact forfeited his office under any law—common law, or statutory law—he may be ousted therefrom by the supreme court in an action in the nature of *quo warranto*; or at least, if there is no other adequate remedy. (*State ex rel. v. Wilson*, 30 K. 661.)

1130. Sec. 78 of the first-class city act provides that the

mayor shall hold his office for two years and until his successor is elected and qualified; and several statutes provide for a termination of the office by resignation, forfeiture, removal, etc., at some earlier period of time. Now as the legislature has had the entire subject-matter of the term of office, and of the termination thereof by resignation, forfeiture, removal, etc., under consideration, it must be presumed that the legislature did not intend that there should be any other mode of forfeiture or removal than that which it has itself designated and prescribed. No mere rule of the common law, if there were any such rule, should be allowed to overturn or destroy the expressed provisions of the statute fixing the term of office; but the incumbent should be allowed to hold the office as long as he is entitled to hold the same under the statutes. (*State ex rel. v. Wilson*, 30 K. 661.)

1131. As a general rule, the court having the power to exercise jurisdiction in *quo warranto* proceedings will not exercise its jurisdiction where some other plain and adequate remedy exists. (*State ex rel. v. Wilson*, 30 K. 661.)

1132. In the present case there are several remedies, some of which at least are adequate: *First*, there is the remedy of removal or amotion, under § 11, subd. 36, of the first-class city act; *second*, there is a remedy of removal, given for certain misconduct, under § 99 of the first-class city act, though this remedy is really not applicable to the present case; *third*, there is the remedy by criminal prosecution and removal, under § 104 of the first-class city act, which remedy is applicable to this case; *fourth*, there is the remedy by criminal prosecution and forfeiture, under § 213, in connection with §§ 207, 208 and 209 of the act relating to crimes and punishments, which remedy is also applicable to this case; *fifth*, there is also a remedy of removal by an election by the people every two years; *sixth*, there are various other remedies for misconduct in office by fine and imprisonment, under various criminal statutes of the state. (*State ex rel. v. Wilson*, 30 K. 661.)

1133. As a general rule, where the jury in a criminal case

return into court in the presence of the parties and say they cannot agree, it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulty in their minds. (*State v. Chandler*, 31 K. 201.)

1134. Separate public offenses, where they are all misdemeanors of a kindred character, and charged against the same person, may generally be joined in separate counts in one information, to be followed by one trial for all, with a separate conviction and punishment for each, the same as though all such offenses were charged in separate informations and tried at different times. (*State v. Chandler*, 31 K. 201.)

1135. The court before which any person is convicted of a criminal offense has the power, in addition to the sentence prescribed or authorized by law, to require such person to give security to be of good behavior for a term not exceeding two years, or to stand committed until such security is given. (*State v. Chandler*, 31 K. 201.)

1136. Where a druggist who has a permit from the probate judge of his county to sell intoxicating liquors for medical, scientific and mechanical purposes, is prosecuted upon information in the district court for selling intoxicating liquors for other than medical, scientific or mechanical purposes, and no other offense is charged against him, he cannot be convicted for the offense of selling intoxicating liquors for medical, scientific and mechanical purposes in an irregular manner. (*State v. White*, 31 K. 342.)

1137. Where, for the purpose of proving the charge made in a single count in a criminal information, evidence is introduced tending to prove several separate and distinct offenses, it is the duty of the court, upon motion of the defendant, to require the prosecutor to elect upon which transaction he will rely for conviction; but the court may exercise some discretion with regard to the definiteness of the election. Therefore, on a prosecution for selling intoxicating liquors in violation of law, where evidence was introduced tending to prove several separ-

rate and distinct offenses, and where the court, on motion of the defendant, required the state to elect upon which transaction it would rely for conviction, and the state elected to rely upon a sale of whisky made by the defendant to one D.; and the evidence of D. tended to show that several sales of both whisky and beer were made by the defendant to the witness, at the defendant's place of business, in November or December, 1882; and the defendant's place of business was definitely shown by the evidence, but the time of the sales was not any more definitely shown than as above stated; and the defendant moved the court to require the state to make the election more definite and certain; and the court overruled the motion: *Held*, Not error. (*State v. Cummins*, 31 K. 376.)

1138. The evidence discussed, and *held*, that it sufficiently appeared that the offense was not barred by the statute of limitations, although the witness testifying with regard to the offense did not state in express terms the year when the offense was committed. (*State v. Cummins*, 31 K. 376.)

1139. In the court below the state elected in the following manner, to wit: "The state for a conviction relies upon a sale of intoxicating liquor by defendant to James Carson." It appears from the evidence, that in November, 1882, James Carson purchased both beer and whisky of the defendant and purchased the same at various times. The court below should have required the state to make its election more definite and certain. (*Per Curiam.*) (*State v. O'Connell*, 31 K. 383.)

1140. Cities of the state of Kansas have no power to license or authorize the sale of intoxicating liquors. (*State ex rel. v. City of Topeka*, 31 K. 452.)

1141. Such power has not been conferred upon cities, but has been withheld from them, and prohibited. (*State ex rel. v. City of Topeka*, 31 K. 452.)

1142. Whenever a municipal corporation usurps any power which might be conferred upon it by the sovereign power of the state, but which has not been so conferred, such corporation may be ousted from the exercise of such power by a civil ac-

tion in the nature of a *quo warranto* in the supreme court. (*State ex rel. v. City of Topeka*, 31 K. 452.)

1143. The sovereign power of the state is inherent in the people, the legislature being a mere instrument of sovereignty; and the people in their sovereign capacity have the power to authorize the sale of intoxicating liquors, or to regulate the same, or to prohibit the same, as they may choose, or to delegate such power to municipal corporations; but the people in this state have withheld such power from municipal corporations, and by their constitution and statutes have prohibited the same. (*State ex rel. v. City of Topeka*, 31 K. 452.)

1144. The city of Topeka has not issued or granted any written or printed licenses or permits authorizing the sale of intoxicating liquors, but for the purpose of obtaining revenue has indirectly and evasively authorized and licensed such sales, and has obtained revenue from such sales by imposing taxes or charges, and simulated fines and forfeitures upon the persons making such sales. *Held*, That as such power has not been conferred upon the city, the city may be ousted from the exercise thereof by a civil action in the nature of *quo warranto* in the supreme court. (*State ex rel. v. City of Topeka*, 31 K. 452.)

1145. A physician, by merely making and filing with the probate judge of his county wherein he practices his profession, an affidavit to keep, observe and perform all the requirements and conditions of the laws of Kansas regulating the sale and use of intoxicating liquors, as prescribed by § 3, ch. 128, Session Laws of 1881, is not liable to the probate judge with whom he files such affidavit for any fees for the certificates of the filing of the affidavit delivered by the probate judge to licensed druggists in his county. (*Miller v. Minney*, 31 K. 522.)

1146. If a county attorney neglects or refuses to perform any act which it is his duty to perform, or corruptly performs any such duty, he forfeits his office, and may be removed therefrom by a civil action, in the nature of a proceeding in *quo warranto*, in the supreme court. (*State ex rel. v. Foster*, 32 K. 14.)

1147. The provisions in the act prohibiting the manufacture

and sale of intoxicating liquors, adopted in 1881, to the effect that "If any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof in the district court shall be fined in any sum not exceeding five hundred dollars, and on such conviction shall be deemed to be removed from office," is not the exclusive remedy for the removal from office of a county attorney who neglects or refuses to perform the duty required of him by said act, or who corruptly performs any such duty. (*State ex rel. v. Foster*, 32 K. 14.)

1148. A civil action instituted in the manner provided in the code of civil procedure for the removal of a county attorney who neglects or refuses to perform any act which it is his duty to perform, or who corruptly performs any such duty, reaches only to the possession of his office and its emoluments. The criminal prosecution provided for in § 12 of the prohibitory act is an additional or cumulative remedy, and in addition to the forfeiture of office, subjects the guilty official, on conviction thereof in the district court, to the infliction of a fine not exceeding five hundred dollars. (*State ex rel. v. Foster*, 32 K. 14.)

1149. Where a county attorney is charged with neglecting or refusing to perform an act which it is his duty to perform under the prohibitory law, or is charged with corruptly performing any such duty, in a civil action to remove him from office, it is not a good defense to answer that the people of his county are opposed to the prosecution of the violators of the law, and therefore, in the exercise of his official discretion, he dismissed all cases of this class brought by him. (*State ex rel. v. Foster*, 32 K. 14.)

1150. If a law enacted by the legislature has not the support of public sentiment, this may be, under some circumstances, a reason for its amendment or repeal; but in a civil action brought against a county attorney to remove him from office for neglecting to perform his duties thereunder, it is not a good defense for his refusing to attempt its enforcement. (*State ex rel. v. Foster*, 32 K. 14.)

1151. The charge of the supreme court delivered to the jury upon the trial of this case, referred to, and held not to be partial, misleading, or in any manner prejudicial to the rights of the defendant. (*State ex rel. v. Foster*, 32 K. 14.)

1152. The provisions of the prohibitory act referred to in the charge of the court delivered to the jury upon the trial of this case, and the sections thereof commented upon in this opinion: *Held*, Not in conflict with the constitution of the United States, or the laws passed in pursuance thereof. (*State ex rel. v. Foster*, 32 K. 14.)

1153. Case of *State v. Allen*, 5 K. 213, referred to and followed. (*State ex rel. v. Foster*, 32 K. 14.)

1154. Case of *State v. Wilson*, 30 K. 661, distinguished. (*State ex rel. v. Foster*, 32 K. 14.)

1155. A mortgage of intoxicating liquors, executed for no other purpose than to secure a promissory note, is void, for the reason that it contravenes the provisions of ch. 128 of the Laws of 1881, commonly known as "the prohibitory liquor law." (*Korman v. Henry*, 32 K. 49.)

1156. Where a criminal statute making certain acts misdemeanors takes effect, and within less than two years thereafter the defendant is prosecuted for a violation of such statute, and the court instructs the jury in substance that it is not necessary in order to convict the defendant that the offense be proved to have been committed on the day charged in the information, but all that is necessary is that it be proved to have been committed "within two years before the commission of the offense as charged in the information;" and the defendant is convicted and sentenced: *Held*, That such instruction is erroneous; but *further held*, from the other instructions and other matters appearing in the case, the error does not seem to have been material, and as no sufficient exception was taken to the instruction, the judgment will not be reversed because of such error. (*State v. Wilgus*, 32 K. 126.)

1157. Where sixteen separate and distinct instructions were given to the jury, many of which were of considerable length

and contained several separate items, and no special exception was taken to any one of such instructions, but only a general exception was taken to the whole of them, which general exception reads as follows: "And the defendant thereupon excepted to the instructions of the court as given to the jury in this case," no proper or sufficient exception was taken to the instruction complained of. (*State v. Wilgus*, 32 K. 126.)

1158. The refusal by a probate judge to grant to an applicant a druggists' permit, under the provisions of § 2, ch. 128, of the act to prohibit the manufacture and sale of intoxicating liquors, except for specific purposes, is not the exercise of judicial functions, and is not appealable or reviewable. (*Martin v. Probate Judge*, 32 K. 146.)

1159. A complaint was filed before a justice of the peace charging the defendant in five separate counts with having violated the prohibitory law. A trial was had before the justice, and the defendant convicted upon the first and fifth counts, and found not guilty on the third count. He appealed to the district court; and the county attorney, upon leave obtained, filed an amended complaint verified by himself, charging the defendant in seven counts, and included in the amended complaint the offense alleged in the third count of the original complaint. To this count the defendant filed his plea of former acquittal, which was sustained. The county attorney, with leave of the court, then struck out all of the counts in the amended complaint but the fourth and fifth, and changed the number of the fourth count to first, so as to make the amended complaint correspond exactly with the first and fifth counts of the original complaint. After these changes were made, the complaint was not refiled or reverified, but the trial proceeded, and the defendant was convicted upon both counts. *Held*, Under the liberal provisions of the criminal code, that the court committed no error prejudicial to the substantial rights of the defendant, as he was tried in the district court for the same offenses for which he was convicted before the justice of the peace, and it was not necessary to refile or reverify the amended

complaint simply because portions thereof were stricken out and count four was numbered one. (*State v. Redford*, 32 K. 198.)

1160. Where an information charges a defendant with unlawfully selling intoxicating liquors without having a permit therefor, it is incumbent upon the prosecution to prove by competent evidence that the defendant had no permit at the time of the commission of the alleged offense, in order to sustain a verdict of guilty. (*State v. Schweitzer*, 27 K. 499; *State v. Nye*, 32 K. 201.)

1161. Where the probate judge testifies that he has in court a book called the "Record of Druggists' Permits;" that he has examined it; that there is no record in it of any permit ever having been issued to the defendant; that if he ever issued a permit to the defendant to sell intoxicating liquors, the book does not show it; and he does not testify that he recorded his permits in this book; and does not testify that it contained all the permits; and does not testify that it was the journal of his court, his evidence is wholly insufficient to prove that no permit was issued. (*State v. Nye*, 32 K. 201.)

1162. Like the preceding case, this evidence is insufficient. If the court had permitted the evidence to stand that the journal or record kept by him, containing druggists' permits, did not show any permit had been issued, we would sustain the verdict. The court struck out competent evidence, but this cannot now be considered. The evidence which was admitted does not tend to show that no permit had been issued to the defendants. (*State v. Nye*, 32 K. 204.)

1163. It is declared by § 15 of the bill of rights in the constitution of the state of Kansas, that no warrant shall be issued to seize any person but on probable cause, supported by oath or affirmation; therefore a complaint or information filed in the district court charging a defendant with a misdemeanor, and verified on nothing but hearsay and belief, is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged, when no previous preliminary examination,

and no waiver of the right of such examination, have been had. (*State v. Gleason*, 32 K. 245.)

1164. An information charging the defendant with a misdemeanor was filed on April 15, 1884, after the court had adjourned its March term for 1884 from March 29, 1884, to April 22, 1884. Upon the filing of the complaint, the defendant was arrested upon the warrant issued thereon, and after his arrest gave bond for his appearance in the district court. No proceeding was taken to release or discharge him from his arrest prior to the reconvening of court. After the court had convened, pursuant to adjournment, and on April 23, 1884, the defendant moved the court to strike the information from the files, and to dismiss the action, upon the ground that the information was not filed in term-time, or within twenty days preceding a regular term of the court; the motion was overruled. *Held*, Not error. (*State v. Babbitt*, 32 K. 253.)

1165. Where a defendant in a criminal action tried before a justice of the peace appeals from the judgment of the justice to the district court, the judgment is vacated, and the defendant is placed in the same condition as if no trial had been had. After the appeal is perfected, the case is to be tried in the district court upon the original complaint, if no new or amended complaint is filed, and any evidence competent to establish the offense therein charged is admissible. (*State v. Forner*, 32 K. 281.)

1166. It is a general rule that any question may be put to a witness on cross examination, the answer to which may have a tendency to show bias or prejudice on the part of the witness. (*State v. Krum*, 32 K. 372.)

1167. A challenge to an array of jurors ought not to be sustained on account of mere irregularities in the drawing of the jurors, or mere informalities on the part of the officers charged with the drawing of the same; yet where the statute specifically prescribes the class or list of persons from which the jurors are to be selected, the failure on the part of the officers to draw the jurors from the class or list prescribed is a sufficient

ground to sustain a challenge to the array. (*State v. Jenkins*, 32 K. 477.)

1168. In the absence of evidence to the contrary, beer will always be presumed to be an intoxicating liquor. (*State v. Teissedre*, 30 K. 476.) And it is not competent for a defendant charged with violating the prohibitory liquor law by selling beer to prove that under a given formula a non-intoxicating liquor may be made, which is sometimes called beer, unless evidence is also offered tending to show that the liquor or beer sold was made from such formula. (*State v. Jenkins*, 32 K. 477.)

1169. The jury returned their written verdict in a criminal case to the judge of the court on Sunday, in the absence of the defendant and his counsel, and without either of them being called or notified. The judge received the verdict, and discharged the jury from further consideration of the case. At the opening of the court on the next day, (Monday,) the defendant asked the court to recall the jury, and allow him the opportunity of having the jury polled in his presence; but the court denied the application. The defendant also moved that the verdict be set aside and stricken from the files; that the jury be recalled, and directed to return a proper verdict; all of which motions, as well as the motion for new trial, were overruled. *Held*, (1) That neither the defendant nor his counsel, in the absence of notice, were bound to be in attendance upon the court on Sunday on the coming in of the jury; (2) that on account of the action of the court in discharging the jury, and refusing to poll the jury in the presence of the defendant, the judgment must be reversed and a new trial granted. (*State v. Muir*, 32 K. 481.)

1170. A physician having no permit therefor, cannot, under the statute, lawfully furnish intoxicating liquor as a medicine to a patient who is actually sick, and charge and receive pay for the same. (*State v. Fleming*, 32 K. 588.)

1171. In a criminal prosecution, where it does not appear that the conviction of the defendant might have been founded upon the evidence of an informer, *held*, that the supreme court cannot

reverse the judgment of the district court because of any supposed error in the instructions of the district court, with reference to the evidence of informers. (*State v. Blackman*, 32 K. 615.)

1172. In a criminal prosecution, the county attorney intending to make J. M. Stilwell a witness in the case, by mistake indorsed J. W. Stilwell on the information, but the court, nevertheless, permitted J. M. Stilwell to testify in the case, over the objections of defendant. *Held*, Not error. (*State v. Blackman*, 32 K. 615.)

1173. In a criminal prosecution under the prohibitory liquor law of 1881, where the verification of the information is made by the county attorney, in accordance with § 12 of that law, the information is, so far as the verification is concerned, sufficient for every purpose, except merely for the purpose of issuing a warrant for the arrest of the defendant. And *further held*, that the case of *The State v. Gleason*, 32 K. 245, is in harmony with these views. And *further held*, where a defendant in such a prosecution, without objection pleads to the merits of the action and goes to trial, he waives all irregularities in the verification of the information, and cannot afterward be heard to question the regularity or validity of any proceedings in the case, if he urges no other objection to the proceeding than that such verification is insufficient. (*State v. Blackman*, 32 K. 615.)

1174. Sec. 18 of the prohibitory liquor law of 1881 is not unconstitutional, or void. (*Hardten v. State*, 32 K. 637.)

1175. Where a wife owns certain real estate and makes her husband her general agent for the management and control of the same for leasing the same, and with her full knowledge he leases it for the purpose that intoxicating liquors may be sold and bartered on the premises contrary to the prohibitory liquor law of 1881, and such liquors are so sold and bartered, and the person who sells and barters the same is afterward prosecuted therefor in a criminal action, and is found guilty and sentenced to pay a fine and the costs of the prosecution, *held*, that the

state has a lien upon such leased premises for the payment of such fine and costs. (*Hardten v. State*, 32 K. 637.)

1176. And this notwithstanding the fact that the wife may not have had any actual personal notice or knowledge of the use that was to be made or was made of the premises; for as her duly-authorized agent had such notice and knowledge it must be held that she had constructive notice and knowledge, and that she is bound by her agent's knowledge. (*Hardten v. State*, 32 K. 637.)

1177. And in such a case, the state may commence an action against the owner of the premises to enforce such lien without first exhausting any remedy which it may have against the party who sold and bartered the intoxicating liquors contrary to law. (*Hardten v. State*, 32 K. 637.)

1178. A state law prohibiting the manufacture and sale of intoxicating liquors, is not repugnant to the constitution of the United States. (U. S. Sup. Ct.) (*Foster v. State*, 32 K. 765.)

1179. A state's statute regulating proceedings for the removal of a person from office, is not repugnant to the constitution of the United States, if it provides for bringing the party against whom the proceeding is taken into court, notifies him of the case he has to meet, and gives him an opportunity to be heard in his defense, and provides also for the deliberation and judgment of the court. (U. S. Sup. Ct.) (*Foster v. State*, 32 K. 765.)

1180. Removal from office by information in the nature of a *quo warranto*, in Kansas, is a civil proceeding; and the statutes of Kansas providing such remedy are not unconstitutional. (*Foster v. State*, 32 K. 765.)

1181. In a criminal prosecution where the defendant lays the foundation for impeaching one of the principal witnesses for the prosecution, and afterward introduces a witness for that purpose, and the prosecution afterward introduces a witness to impeach the impeaching witness; and the court in the presence and hearing of the jury decides in effect that the impeaching witness of the defendant has sworn falsely, and that the im-

peaching witness for the prosecution, who was also the principal witness for the prosecution, has sworn truthfully; and upon the evidence it is not clear that the defendant is guilty of the offense charged against him, but the jury, after ten hours' deliberation, find the defendant guilty, and he is sentenced accordingly: *Held*, That the trial court committed material error in giving its opinion with regard to the credibility of the witnesses and the weight of their testimony. (*State v. Hughes*, 33 K. 23.)

1182. *Per Curiam*: This was a criminal prosecution for selling intoxicating liquor in violation of the prohibitory liquor law of 1881. The defendant was arraigned, pleaded not guilty, was tried before the court and a jury, and found not guilty. Judgment was rendered by the court discharging the defendant; and from this judgment the state attempts to appeal to this court. Of course no such appeal can be had, and upon the authority of the following cases the appeal will be dismissed: *State v. Carmichael*, 3 K. 102; *City of Olathe v. Adams*, 15 K. 391; *City of Oswego v. Belt*, 16 K. 480; *State v. Crosby*, 17 K. 396. (*State v. Phillips*, 33 K. 100.)

1183. On the trial of the appellant for a misdemeanor, where the court erred in overruling a challenge by him for cause to a person sworn on his *voir dire* as a juror, but the court excused such challenged juror before any other juror was examined, and before any juror was challenged peremptorily by the defendant: *Held*, That the overruling the challenge to the juror did not affect the substantial rights of the defendant, and is no ground for the reversal of the judgment of the trial court. (*State v. Drake*, 33 K. 151.)

1184. An information charged the defendant with the violation of the prohibitory law in selling intoxicating liquors without permit. The name of William Porter was indorsed on the information as a witness for the state, and the name of no other Porter appeared thereon. Upon the trial, one W. R. Porter was sworn as a witness, and without objection by the defendant testified to sale of intoxicating liquors made by the latter to him, but did not in his examination state his Christian

name. No other Porter testified as a witness. The county attorney elected to rely on the sales made to William Porter for conviction. *Held*, That under the circumstances, as all the parties and the jury understood that William Porter was the W. R. Porter who had testified, therefore, their verdict to the effect that the defendant was guilty of making sales to William Porter will not be set aside upon the ground that there was no evidence showing such sales. (*State v. Drake*, 33 K. 151.)

1185. Where the defendant was charged with selling intoxicating liquors without a permit, and it appeared upon the trial that said defendant had made sales of intoxicating liquors to parties by the glass and without any permit, an instruction that "each and every sale of intoxicating liquor made without a druggist's permit therefor from the probate judge of the county wherein such sale is made is unlawful," is not misleading or improper. (*State v. Drake*, 33 K. 151.)

1186. Where a county attorney files an information or complaint against a defendant, under the provisions of ch. 128, Session Laws of 1881, commonly known as the prohibitory law, and verifies the same upon information and belief, and to obtain a warrant for the arrest of the defendant has another person verify the complaint to be true, of his own knowledge, and there is a failure to convict in the case, the costs of the prosecution are to be paid by the county in which the prosecution was begun; and the person subsequently verifying the complaint as true cannot be adjudged to pay the costs, under the provisions of §326 of the criminal code. (*State v. Manlove*, 33 K. 483.)

1187. The courts of our state are not bound to recognize or enforce a contract which is in contravention of our statutes, even though it may be valid in the state where it is made. And if a wholesale liquor dealer in Missouri enters into an arrangement with a citizen of Kansas to sell and ship intoxicating liquors to him in Kansas, for the express purpose of enabling the purchaser there to resell the liquors contrary to the laws of the state, and actually aids the purchaser in the illegal traffic, he is not entitled to the assistance of our courts in recov-

ering the price of the liquors thus sold. (*Feineman v. Sachs*, 33 K. 621.)

1188. Mere knowledge of the illegal purpose of the buyer is not sufficient to invalidate a sale made in Missouri, which is in conformity with the laws of that state. In order to render the sale void, and defeat a recovery of the price of the liquors, there must be some participation or interest of the seller in the illegal transaction. (*Feineman v. Sachs*, 33 K. 621.)

1189. It is error for the court to give an instruction founded upon facts that are not in proof. (*Feineman v. Sachs*, 33 K. 621.)

1190. The district court has original and concurrent jurisdiction with justices of the peace, to hear and determine criminal prosecutions for violations of the prohibitory liquor law of 1881. where the punishment to be imposed cannot exceed a fine of \$500, or imprisonment in the county jail one year. (*State v. Brooks*, 33 K. 708.)

1191. And the prosecution in the district court may be upon information filed by the county attorney. (*State v. Brooks*, 33 K. 708.)

1192. And where such information states an offense, and is sworn to positively by some person, it is sufficient of itself to authorize the clerk to issue a warrant for the arrest of the defendant, without any finding by the clerk or other person of probable cause to believe the defendant guilty of the offense, and is sufficient to authorize the district court to put the defendant upon his trial. (*State v. Brooks*, 33 K. 708.)

1193. Where an information is sworn to positively by some person, it is not necessary for the county attorney to also verify the information by his own oath. (*State v. Brooks*, 33 K. 708.)

1194. Where a county attorney files an information on October 15, 1884, and states that the offense was committed on the —day of —, 1884, and does not state the day or the month when the offense was committed: *Held*, That the information is nevertheless sufficient. (*State v. Brooks*, 33 K. 708.)

1195. Where the information is verified by the oath of a

private person, and not by the county attorney, the defendant should not be found guilty of any offense, except some offense of which the complaining witness had notice or knowledge at the time of verifying the information. (*State v. Brooks*, 33 K. 708.)

1196. Where a defendant is prosecuted in separate counts for several violations of the prohibitory liquor law, and is found guilty under some of the counts and not guilty under the others, he should not be required to pay costs accruing under the counts under which he is acquitted, but should recover costs. (*State v. Brooks*, 33 K. 708.)

1197. In prosecutions for selling intoxicating liquor in violation of the prohibitory liquor law of 1881, it is not necessary to state the kind of intoxicating liquor sold, nor the person to whom sold. (*State v. Brooks*, 33 K. 708.)

1198. Where an information contains several counts, each charging the defendant with a sale of intoxicating liquor in violation of the prohibitory law of 1881, and the defendant is found guilty under each count, the court may under each count sentence the defendant to the full amount of the punishment prescribed by statute for each offense; and where imprisonment is imposed, may adjudge the imprisonment under one count to commence at the termination of the imprisonment under another count. (Crim. Code, §250.) (*State v. Carlyle*, 33 K. 716.)

1199. A civil action brought by a county attorney in the name of the state, under the provisions of §18, ch. 128, Laws of 1881, to enforce a lien for fines and costs upon real estate, against the owner of premises, who has knowingly suffered a person to sell liquor thereon in violation of law, comes within subd. 2 of §18 of the code, being an action upon a liability created by statute, and is not barred by the fourth subdivision of said §18. (*State v. Pfefferle*, 33 K. 718.)

1200. Where a part only of the consideration of an entire contract is illegal and the contract is not in its nature divisible

or separable, the contract is tainted, and will be treated as wholly void. (*Gerlach v. Skinner*, 34 K. 86.)

1201. Where S. alleged that in 1883 he purchased, in Osage City, Osage county, in this state, from G., a lot and the building thereon, and a large quantity of intoxicating liquors and the fixtures of a bar contained in the building, for the gross sum of \$4,000, and no separate price was fixed or agreed upon for the lot, or intoxicating liquors, or the fixtures, and it appeared that neither of the parties had any permit to sell intoxicating liquors, and that S. did not purchase the liquors for medical, scientific or mechanical purposes, *held*, that the contract for the purchase of the lot, building, intoxicating liquors, etc., is void, as in contravention of ch. 128, Laws of 1881, commonly known as "the prohibitory liquor law," and therefore the contract cannot be used as the basis of an action for specific performance. (*Gerlach v. Skinner*, 34 K. 86.)

1202. A plea in abatement is a dilatory plea, and must be pleaded with strict exactness; it must be certain to every intent. (*State v. Skinner*, 34 K. 256.)

1203. Under the provisions of § 79 of the criminal code, no plea in abatement taken to any grand jury duly charged and sworn, for any irregularity in their selection, will be sustained, unless it be one that implies corruption. (*State v. Skinner*, 34 K. 256.)

1204. Where an indictment or information in separate counts states separate misdemeanors of a kindred character, against the same person, the defendant is not entitled to four peremptory challenges upon each count or separate offense, but is entitled, upon the trial, under the indictment or information, to four peremptory challenges, and no more. (Crim. Code, § 198.) (*State v. Skinner*, 34 K. 256.)

1205. Where an indictment or information charges in separate counts separate public offenses, and they are all misdemeanors of a kindred character and against the same person, the defendant cannot as a matter of right require the state,

before the trial, to elect upon what count or specific offense it will rely for conviction. (*State v. Skinner*, 34 K. 256.)

1206. Where distinct transactions in cases of misdemeanors are joined in separate counts in one indictment against the same person, and followed by one trial for all, the defendant cannot prove by the county attorney, or any witness before the grand jury, that the offenses for which he is being tried were not the identical offenses which the grand jury had in contemplation when finding the indictment, as the grand jury are at liberty to find a bill upon their own knowledge. (*State v. Skinner*, 34 K. 256.)

1207. In a case where the defendant is charged with unlawfully selling intoxicating liquors without a permit, in violation of the prohibitory law of the state, and evidence is introduced making the question important, it is not error for the court to permit the witness to answer as to "who assumed to be the proprietor of and to control the premises described in the indictment." Even if the evidence offered be regarded rather as an opinion than a fact, it is of such a character of opinion as may be stated by a person who witnessed the conduct and conversation of the defendant at the time, upon the premises. (*State v. Skinner*, 34 K. 256.)

1208. The following instruction held not to violate § 215 of the criminal code, which provides that the neglect or refusal of the person on trial to testify shall not be considered by the court or jury before whom the trial takes place, viz.: "You are not authorized by law to arbitrarily reject, without cause or reason, the testimony of any witness, but it is your duty to carefully examine and so far as possible harmonize all the testimony in the case upon the basis of truth; but if you are unable to do this, then you are authorized, and it is your duty, to reject such of it as you may think not entitled to credit; and in considering the testimony you should not draw any unfair inferences or unjust conclusions against the defendant because of any failure or omission on his part to offer any particular kind of evidence, but he should be tried alone upon

the facts proved. You are to presume the existence of no fact unless it has been testified to; you are to found your verdict on the testimony delivered by the witnesses upon the witness stand, and are not to supplement it with some other fact that you may think exists, but which has not been proved." (*State v. Skinner*, 34 K. 256.)

1209. Where a challenge to the array or panel of petit jurors is sustained, there need be no delay on the part of the court in summoning, under the provisions of the statute, a sufficient number of persons properly qualified to act as jurors in any case. (Comp. Laws of 1879, ch. 54, §§ 23, 26.) (*Trembly v. State*, 20 K. 116; *State v. Skinner*, 34 K. 256.)

1210. Where a person acts as clerk or agent of another in selling intoxicating liquors for him, with his knowledge and consent, in violation of law, the principal may be prosecuted and punished for such unlawful sales by his clerk or agent; and in such a case, where it is admitted that the principal has no permit to sell intoxicating liquors, it is not necessary for the state in the first instance, in order to convict the principal, to show that his clerk or agent had no permit, if the sales were made by the clerk or agent for the principal, in the ordinary line of his duty. (*State v. Skinner*, 34 K. 256.)

1211. Where a repealing statute contains a special saving clause, the general saving statute contained in § 1, ch. 104 of the general statutes (Comp. Laws of 1879, ch. 104, § 1,) will not apply, and no rights or remedies will be saved, except such as are saved by the special saving clause. (*State v. Knauber*, 34 K. 275; *State v. Webster*, 34 K. 276; *State v. Showers*, 34 K. 269.)

1212. When the legislature amended the prohibitory liquor law of 1881, it repealed that law in all things which it did not expressly save; and in the law of 1885 only pending suits for the violation of the old law were saved. This prosecution was not pending when the law of 1885 went into force and effect. (*In re Gosnell*, 34 K. 275.)

1213. The county attorney, acting by virtue of the provisions

of § 8, ch. 149, of the Laws of 1885, examined various witnesses, who gave their testimony before him, which was reduced to writing, and the persons so examined were sworn to the statements by them severally made, and these sworn statements were not only filed in the district court with the information, but were attached thereto. The defendant moved to have them stricken from the information, which motion the court overruled, upon the ground that such statements were a part of the information. *Held*, That the court below erred in holding that such statements were a part of the information; but the refusal to strike them from the information could not of itself and alone prejudice materially any of the substantial rights of the defendant, and was therefore not material error. (*State v. Clark*, 34 K. 289.)

1214. The information was amply sufficient in its statements of the offense charged against the defendant, and it was verified by the county attorney upon information and belief. The defendant moved to quash the same, and the court overruled the motion. *Held*, Not error; and this although the statement attached to the information may not have stated any offense, and although the information was verified by the county attorney only upon information and belief. (*State v. Clark*, 34 K. 289.)

1215. The foregoing statements were read and considered by the jury during their deliberation: *Held*, That this was error for which a new trial should be granted. (*State v. Clark*, 34 K. 289.)

1216. The fact that the jurors read and considered the foregoing statements during their deliberations may be shown by the testimony of the jurors themselves, although the jurors could not be allowed to testify that their verdict was based upon such statements, or that the statements had any influence upon the jurors in forming their verdict. (*State v. Clark*, 34 K. 289.)

1217. Sec. 16 of art. 2 of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," does not invalidate or render unconstitutional § 15 of ch. 128, Laws of 1881, commonly known

as the prohibitory liquor law. (*Werner v. Edmiston*, 24 K. 147; *Durein v. Pontious*, 34 K. 353.)

1218. Under the provisions of said § 15, an action cannot be maintained jointly by the infant children who have been injured in their means of support on account of the intoxication of their father, against the persons who sold, bartered or furnished the intoxicating liquor. In such a case, the statute gives every child the right to an action for the damages that he or she has sustained, but does not give the children any right to maintain a joint action. (*Durein v. Pontious*, 34 K. 353.)

1219. An action under said § 15 is purely statutory, and must be commenced within three years after the cause shall have accrued, as prescribed by subd. 2 of § 18 of the code—the action being upon a liability created by statute, other than a forfeiture or penalty. (*Durein v. Pontious*, 34 K. 353.)

1220. Information. *State v. Gleason*, 32 K. 245, distinguished; *State v. Blackman*, 32 K. 615, affirmed. (*State v. Bjorkland*, 34 K. 377.)

1221. Where an indictment was found and filed on January 3, 1885, by the grand jury, charging an offense under § 7 of the prohibitory liquor law of 1881, and on March 10, 1885, such section was repealed, but the repealing statute provided that all prosecutions then pending should be continued the same as if such repealing statute had not been passed, *held*, that all the rights and remedies which the repealing statute purported to save were saved, and that the defendant may be tried, convicted and punished under said indictment. (*State v. Schmidt*, 34 K. 399.)

1222. The indictment, which charged that defendant sold intoxicating liquors without a permit, and in violation of law, *held* sufficient. (*State v. Schmidt*, 34 K. 399.)

1223. Where the indictment charged, among other things, that the defendant “did unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors,” and the defendant moved the court to require the state to elect to prosecute upon some particular sale or gift or some particular

kind of liquor, and this motion was made before the commencement of the trial, and the court overruled the motion, *held*, not error. (*State v. Schmidt*, 34 K. 399.)

1224. Where a witness testifies to a fact, and such fact is abundantly proved by the testimony of other witnesses, and there is no contradictory evidence, *held*, that it is immaterial whether the testimony of such witness is competent, or not. (*State v. Schmidt*, 34 K. 399.)

1225. Where one of the questions in issue is whether the defendant had a permit to sell intoxicating liquors under the prohibitory liquor law of 1881, and the probate judge testifies as a witness that he has the possession of all the records of the probate judge's office, and has at that time the record of permits, and that such record shows that no permit has ever been granted to the defendant, and he also testifies that he has never issued any such permit, *held*, that the evidence is competent, and proves *prima facie* that the defendant did not have any such permit. (*State v. Schmidt*, 34 K. 399.)

1226. Where a witness in a criminal prosecution testifies in behalf of the state without his name having first been indorsed upon the indictment, and so testifies without objection, *held*, that it is too late to make the objection for the first time in the supreme court. A conviction and sentence upon the testimony of such witness may be upheld. The rule enunciated in the case of the *State v. Crimmins*, 31 K. 376; with regard to the election of the offense relied upon for a conviction, referred to, and followed. (*State v. Schmidt*, 34 K. 399.)

1227. In a criminal prosecution upon an indictment, where the state relies for a conviction upon a sale of beer made to M., it is not competent for the defendant to show by the testimony of M. that the offense upon which the state relies for conviction was not testified to by M. before the grand jury; for the grand jury may find indictments upon their own knowledge. (*State v. Skinner*, 34 K. 256; *State v. Schmidt*, 34 K. 399.)

1228. Upon a conviction in a criminal prosecution for violation of § 7 of the prohibitory liquor law of 1881, the court may,

under § 12 of such law, tax against the defendant, as part of the costs, a county attorney's fee for \$15. (*State v. Schmidt*, 34 K. 399.)

1229. Under the provisions of the act of March 13, 1879, "providing for changing the fronting of lots in incorporated cities," the changes made by an ordinance passed for that purpose have no validity until the certificate and plat referred to in § 3 of the act shall have been filed in the office of the register of deeds of the proper county. (*State v. Head*, 34 K. 419.)

1230. Such certificate, to be of any force or effect, must substantially comply with the provisions of § 3 of said act; and therefore the certificate of the clerk of the city must not only describe the ordinance changing the frontage of the lot or lots therein referred to, by its number and the date of its passage and publication, but must also set forth that by such ordinance a certain block or lot, or blocks or lots, of such city, (describing them according to their description upon the recorded plat of such city,) have been changed so as to accord with the plat to which such certificate is attached. (Laws of 1879, ch. 79, § 3.) (*State v. Head*, 34 K. 419.)

1231. When an ordinance is passed by an incorporated city to change the frontage of certain lots described therein, and the city clerk attaches the following certificate to the recorded plat of the block or lots affected by the proposed change, viz.: "CITY CLERK'S OFFICE, CITY OF TOPEKA.—The within plats presented to the council, March 12, 1883, and approved March 12, 1883, as per ordinance No. 478, approved March 14, 1883, and published in the *Daily Commonwealth* March 15, 1883. Witness my official hand and seal of said City of Topeka, this 16th day of March, 1883.—(SEAL.) GEO. TAUBER, *City Clerk*," and the ordinance named in the certificate is not attached to the plat, or made a part thereof: *Held*, Such certificate is fatally defective, as not being in substantial compliance with the provisions of § 3, ch. 79, Laws of 1879. (*State v. Head*, 34 K. 419.)

1232. The section of the prohibitory liquor law which provides that the judgment for fine and costs for a violation of

that law shall be a lien upon the premises where the intoxicating liquors were unlawfully sold, is not in conflict with § 16 of art. 2 of the state constitution. (*Hardten v. State*, 32 K. 637; *State v. Snyder*, 34 K. 425.)

1233. Nor does the statute violate that clause of § 12 of the bill of rights which provides that "no conviction in the state shall work a corruption of blood or forfeiture of estate." (*State v. Snyder*, 34 K. 425.)

1234. Where the place where intoxicating liquors are unlawfully sold is described in an information charging an offense under the prohibitory liquor law, as follows: "In the south portion of a certain connected row of frame buildings front east on Spruce street, between North Second street and North Third street, in the city of Abilene, in said Dickinson county and state of Kansas," and no motion is made to quash the information, and the alleged indefiniteness of the description is raised only by objections to the introduction of evidence, and thereupon the court construes the information to refer "to the south building of the connected row of frame buildings fronting east on Spruce street, between North Second street and North Third street, in the city of Abilene," and limits the evidence to the extreme south building of the connected row of frame buildings, *held*, that the description in the information, as construed and limited, is sufficient. (*State v. Rohrer*, 34 K. 427.)

1235. As a general rule, newly discovered evidence merely cumulative is no ground for a new trial. (*Clark v. Norman*, 24 K. 515; *State v. Rohrer*, 34 K. 427.)

1236. Newly discovered evidence of hostility to the defendant in a criminal action, on the part of a witness whose testimony was used against the defendant at the trial, is not a cause for a new trial. (*State v. Rohrer*, 34 K. 427.)

1237. Under the authority of *Franklin v. Westfall*, 27 K. 614, ordinance No. 459 of the city of Topeka, entitled "An ordinance to prohibit the sale of intoxicating liquor, and to suppress places where intoxicating liquors are sold; and the amendment thereto by ordinance No. 494 of said city, are valid. (See

subd. 28, § 11, ch. 37, Laws of 1881; arts. 3 and 4, ch. 37, Laws of 1881.) (*City of Topeka v. Myers*, 34 K. 500.)

1238. This case however must be reversed, on account of the misconduct of the prosecuting attorney in using the following words in addressing the jury: "If the defendant is not guilty, why did he not take the stand? He could have easily proven that he did not keep the place." (Crim. Code, § 215; *The State v. Balch*, 31 K. 465, and cases cited. See also 21 Cent. L. J., p. 447; *The State v. Brownfield*, 15 Mo. App. 593.) (*City of Topeka v. Myers*, 34 K. 500.)

1239. The statute provides that in case any grand juror fails to attend or is discharged, his place shall be filled by a talesman. (Sec. 74, Crim. Code.) The talesman is to be selected in the discretion of the sheriff; but where the judge gives the sheriff the names of several persons to act as talesmen, and requests him to summon them, and the sheriff complies with the request, and two of the persons thus named and summoned serve upon the grand jury, *held*, in the absence of other proof, the supreme court is not to assume that the district judge acted from any wrong or improper motive in naming the talesmen and in making the request of the sheriff, and therefore it cannot be said that such alleged irregularity in the selection of the talesmen amounts to corruption. (*State v. Copp*, 34 K. 522.)

1240. The absence of any member of the grand jury on account of sickness, or any other cause will not prevent the other members of the grand jury from finding and returning indictments, provided, of course, there are twelve members left to transact business; but no indictment can be found without the concurrence of at least twelve grand jurors. (*State v. Copp*, 34 K. 522.)

1241. Where a druggist has a permit to sell intoxicating liquors, all his clerks and agents may sell the same for him in his drug store, without violating the law; but such sales must be made in the drug store where the business is carried on and the permit to sell is posted, and the druggist cannot sell, under his permit, intoxicating liquors at any other or different place

than the drug store where the permit is posted; and if any clerk or agent of the druggist sells or barter intoxicating liquors at another and different place from the drug store of the druggist, the permit of the druggist is no protection to such clerk or agent, so unlawfully engaged in the sale or barter of intoxicating liquors. (*State v. Copp*, 34 K. 522.)

1242. Where the county attorney is required to elect upon what particular sale of intoxicating liquors he will rely for a conviction—testimony of several unlawful sales having been given under a single count—it is not essentially necessary that he should designate the kind of liquor sold, but it is enough if in any other way, and with reasonable certainty, he points out the particular sale upon which a conviction will be asked. (*State v. Guettler*, 34 K. 582.)

1243. Where a witness testified in support of a single count that at different times during the year preceding the trial the defendant had sold him both beer and whiskey, and the county attorney, when called on to elect upon which particular sale he would rely for a conviction, elected to stand upon the sale made to the witness, as testified to by him, but he did not designate the time of such sale, the kind of liquor sold, nor did he indicate in any other way the particular sale relied upon, *held*, that the election was not sufficiently definite. (*State v. O'Connell*, 31 K. 383; *State v. Guettler*, 34 K. 582.)

1244. Where the defendant is prosecuted for several distinct offenses properly joined and charged in the same information, and a separate verdict of guilty, and an independent judgment is rendered under each count, the reversal of the judgment upon one conviction in the case will not disturb or work a reversal of the others. (*State v. Guettler*, 34 K. 582.)

1245. Under the provisions of §11, ch. 149, Laws of 1885, commonly known as the prohibitory liquor law, whenever the county attorney of any county shall be unable, or shall neglect or refuse, to enforce the provisions of that act in his county, the attorney general of the state may appoint as many assistants as he shall see fit to enforce the law; and his assistants

may sign, verify and file all such complaints, informations, petitions and papers as the county attorney is authorized to sign, verify, or file. (*In re Gilson*, 34 K. 641.)

1246. Where the assistant of the attorney general verifies and files an information in the district court, under the provisions of § 11, ch. 149, Session Laws of 1885, charging the defendant with a violation of the prohibitory liquor law, and a trial is had before the court, and the defendant found guilty and sentenced to pay a fine, and also to be imprisoned, and he is so imprisoned, *held*, on a petition for a writ of *habeas corpus*, that it cannot be inquired into or determined whether the attorney general acted upon sufficient reasons in making the appointment of the assistant. (*In re Gilson*, 34 K. 641.)

1247. Under § 2, ch. 128, Laws of 1881, the probate judge is invested by the statute with discretionary power in granting permits, and the duty to do so is not peremptory and absolute. It is not claimed that the probate judge refused to receive or consider the application presented. He has heard the application, and determined not to grant the same. He refuses to give his reasons therefor, but that is immaterial: he has acted. (*State v. Robinson*, 1 K. 188; *Stanley v. Monnet*, 34 K. 708.)

1248. Mere knowledge by the vendor of goods lawfully sold in one state that the vendee intends to use them in violation of law in another state, will not defeat an action brought in such other state by the vendor against the vendee for the purchase price of the goods. In order that the action in such a case may be defeated, it must be further shown that the vendor sold the goods for the purpose that the law should be violated, or that he had some interest in its violation, or that he participated in some manner in the unlawful purpose. (*Feineman v. Sachs*, 33 K. 621; *Distilling Co. v. Nutt*, 34 K. 724.)

1249. Where a county attorney, acting by virtue of the provisions of § 8, ch. 149, Laws of 1885, commonly called the prohibitory liquor law, examines various witnesses, who give their testimony before him, which is reduced to writing and sworn to by them and filed with the information charging de-

fendant with violations of said chapter 149, and the information so filed is verified by the county attorney on information and belief only, and the names of the witnesses so examined are indorsed upon the information, *held*, that the defendant cannot be held convicted of any violations of said act not therein referred to or set forth; and *further held*, that in this case the information and the sworn statements filed with it disclose with great particularity the nature and cause of the accusation made against the defendant. (*State v. Whisner*, 35 K. 271.)

1250. The phrase "due process of law" means law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights. (*State v. Whisner*, 35 K. 271.)

1251. Where a defendant is charged in an information filed against him in the district court with violations of the prohibitory liquor law of the state, and there is filed with the information a sworn statement of several witnesses, whose names are indorsed upon the information, tending to describe and set forth with greater certainty and precision the offenses charged in the information, and the defendant is allowed to appear in court and defend by counsel, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and is given a speedy public trial, by an impartial jury of the county in which the offenses are alleged to have been committed, the proceeding against him is clearly by "due process of law." (*State v. Whisner*, 35 K. 271.)

1252. Where the county attorney files with the information the sworn statements of witnesses disclosing that the defendant has committed offenses against the provisions of the prohibitory liquor law, the defendant, upon the trial, has no right to complain that the witnesses making said statements were required to appear by subpoena before the county attorney and give their testimony. As to such matter, the defendant stands before the court as if the witnesses had voluntarily appeared and

made their statements before the county attorney concerning their knowledge of the offenses he has committed against the provisions of said act. (*State v. Whisner*, 35 K. 271.)

1253. Where the affidavit annexed to an information charging the defendant with violations of the prohibitory liquor law is verified by the county attorney "to the best of his information and belief," and the sworn statements of witnesses are filed by the county attorney with the information, disclosing the fact that offenses have been committed by the defendant against the provisions of said act, as charged in the information: *Held*, That the verification sufficiently complies with the requirements of the statute. (*State v. Whisner*, 35 K. 271.)

1254. Where twenty-six persons are summoned to appear as the regular panel of petit jurors, and it is affirmatively shown on the part of the defendant on trial for a misdemeanor that two or three of the panel are not eligible to be returned on the jury list, *held*, that the court has ample power to purge the jury without sustaining a challenge to the array; *held further*, that in such a case there has not been such a palpable disregard of the statute in selecting and drawing the regular panel of jurors as to require a challenge to the array to be sustained. (*Rld. Co. v. Davis*, 34 K. 199; *State v. Whisner*, 35 K. 271.)

1255. The governor of the state is required by the statute to cause all bills or acts, which have become laws by his approval, to be deposited in the office of the secretary of state without delay. (Sec. 5, art. 1, ch. 102, Comp. Laws of 1879.) (*State v. Whisner*, 35 K. 271.)

1256. There is no constitutional or statutory law which requires the governor to return to either house of the legislature any bill or act after it has received his approval and signature, and if the governor reports to the house of representatives his approval of a bill, it is simply a matter of courtesy only. (*State v. Whisner*, 35 K. 271.)

1257. After an act of the legislature has, in the regular and constitutional mode, passed both branches thereof and has been properly signed by the proper officers of both houses, and has

been regularly presented to the governor for his approval, and he has approved and signed the same without any mistake, inadvertence or fraud, and thereafter has voluntarily deposited it with the secretary of state, as a law of the state, it has passed beyond his control; its *status* as a law has then become fixed and unalterable, so far as he is concerned, and any subsequent message by him to the house of representatives, notifying that body of his approval of the act, but setting forth his objections to certain provisions of the act, and giving his construction thereof, does not qualify or otherwise affect the act, or the validity of his approval. (*State v. Whisner*, 35 K. 271.)

1258. Where a criminal warrant is issued upon an information charging the defendant with selling intoxicating liquors in violation of law, and the defendant, without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, enters into a recognizance for his appearance at the next term of the court, and is thereby discharged from arrest, he waives any supposed defects or irregularities in the issuing of the warrant without a sufficient verification of the information, and cannot afterward for that reason, and upon motion have the warrant quashed or set aside. (*State v. Longton*, 35 K. 375.)

1259. Prosecution for a violation of a certain prohibitory liquor ordinance of the city of Topeka. From a conviction at the April term, 1884, of the district court of Shawnee county, the defendant Myers appealed. The supreme court reversed the case on account of the misconduct of the prosecuting attorney in using the following words in addressing the jury: "If the defendant is not guilty, why did he not take the stand? He could have easily proven that he did not keep the place." (*City of Topeka v. Myers*, 34 K. 501.) The city filed a motion for a rehearing, which was decided at the July, 1885, session of the court. *Per Curiam*: The evidence produced upon the motion for a rehearing is painfully conflicting as to what actually occurred upon the trial in the court below with respect to the conduct of the counsel for appellee; but it is not necessary

to determine what is proved or disproved as to those matters. The only question before us is, whether the bill of exceptions embraced in the record has been changed since it was allowed and signed by the district court. The evidence does not establish that any change therein has been made. Under these circumstances, the motion for a rehearing must be overruled. (*City of Topeka v. Myers*, 35 K. 554.)

1260. The defendant was convicted first before a police judge, and afterward in the district court, for violating an ordinance of a city of the third class, and he then appealed to the supreme court. The sentence was that he should pay a fine and the costs of suit, "and that he stand committed to the jail of the county until the amount of said fine and costs shall be paid." *Held*, That the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court. (*City of Miltonvale v. Lanoue*, 35 K. 603.)

1261. *And further held*, In such case, that the order of the district court providing for the imprisonment of the defendant in the county jail, which order is in compliance with § 1 of ch. 34 of the Laws of 1879, (Comp. Laws of 1879, ¶ 943,) is not erroneous, notwithstanding § 66 of the act relating to cities of the third class, and notwithstanding the fact that the ordinance provided for imprisonment in the city jail and not in the county jail. (*City of Miltonvale v. Lanoue*, 35 K. 603.)

1262. Where a landlord leases his premises to a tenant, for a term of years at a stated rent, and thereby loses all control over the premises, while the tenant is in possession, and subsequently an injunction is granted against him and a sub-tenant, forbidding them from opening or keeping a saloon upon the premises for the sale of intoxicating liquors in violation of law, and afterward, and while the original lessee is in possession of the premises under the lease, a sub-tenant opens a saloon therein and sells intoxicating liquors, without having any permit therefor, the mere knowledge of the landlord that his premises are used for the sale of intoxicating liquors in violation

of law, and his failure or omission to take steps to avoid the lease and to reënter the premises, is not sufficient to justify his punishment for contempt for disobedience of the temporary injunction. (*Koester v. State*, 36 K. 27.)

1263. In a criminal prosecution upon an indictment, it is claimed that the trial court erred in permitting a witness to testify whose name was not indorsed on the indictment; but it is not shown what the witness's testimony was, or that any objection was made to his testimony, or for whom he testified, if he did testify; and from anything appearing in the record of the case he may have testified on behalf of the defendant. *Held*, That no error is shown. (*State v. Shenkle*, 36 K. 43.)

1264. In such a prosecution, where the defendant was charged with selling intoxicating liquor in violation of law, and the court instructed the jury, among other things, that if they found that "the defendant sold, bartered or gave any beer" to a certain person, without having a permit therefor, they should find the defendant guilty, but it is not shown what the evidence in the case was, nor was any objection made or exception taken to the instruction, and in the supreme court it is claimed that the trial court erred in using the word "gave," *held*, That no material error is shown. (*State v. Shenkle*, 36 K. 43.)

1265. Where, in such prosecution, the instructions of the trial court to the jury seem to be sufficient, and no further or additional instructions were asked for, *held*, that the trial court did not err in failing to give further or additional instructions. (*State v. Shenkle*, 36 K. 43.)

1266. And in such prosecution, where an instruction, given by the court to the jury, was, that "any one who counsels, aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were the principal," *held*, that such instruction is not erroneous. (*State v. Shenkle*, 36 K. 43.)

1267. Under the information charging the unlawful sale of intoxicating liquors, there was proof that the defendant sold a beverage called "Phoenix," which stimulated and intoxicated

those who drank it. *Held*, That the testimony that the defendant had a barrel of whisky on tap, in his place of business, tended to support the charge, and was admissible. (*State v. Pfefferle*, 36 K. 90.)

1268. Where a defendant in a criminal case takes the witness stand, to testify in his own behalf, he assumes the character of a witness and is entitled to the same privileges, and subject to the same tests, and to be contradicted, discredited or impeached, the same as any other witness. (*State v. Pfefferle*, 36 K. 90.)

1269. The extent to which a witness may be cross examined, on matters irrelevant and collateral to the main issue, with a view of impairing his credibility, depends upon the appearance and conduct of the witness, and all the circumstances of the case, and necessarily rests in the sound discretion of the trial court; and only where there has been a clear abuse of that discretion will error lie. (*State v. Pfefferle*, 36 K. 90.)

1270. A co-defendant, who voluntarily becomes a witness, and has not appealed, was asked by the state, on cross examination, if he had not recently been tried, and convicted several times, for the unlawful sale of intoxicating liquors, and, over objection, gave an affirmative answer. *Held*, To be no error. (*State v. Pfefferle*, 36 K. 90.)

1271. Where the only sales of liquor charged in the information were those made within the present year, and there was no proof of sales, except of those made during the same year, it was unnecessary for the court to instruct the jury that they could only consider such sales as were made within two years preceding the filing of the information. (*State v. Pfefferle*, 36 K. 90.)

1272. A party who desires an instruction upon some particular question not included in the general charge, should request the presiding judge to give the same; but where no such request is made, and the case is fairly presented to the jury, he cannot afterward complain that the instruction was not given. (*State v. Pfefferle*, 36 K. 90.)

1273. It was decided in *The State v. The City of Topeka*, 30 K. 653, that cities in this state have no power to license or impose a license tax on the business of selling intoxicating liquors, contrary to the provisions of the constitution and the statute; and that if a city assumes such unlawful corporate power it may be ousted from the exercise thereof, by proceedings in the nature of *quo warranto*. Therefore the only question to be considered in this case is, whether the city of Leavenworth has attempted to authorize or license the sale of intoxicating liquors. This is a question of fact for our determination from the evidence introduced. An examination of the evidence satisfies us that although the city of Leavenworth has not by any written or printed license expressly authorized the sale of intoxicating liquors, it has effectually done so by the action of its officers. The shifts and subterfuges adopted for that purpose are even more culpable and indefensible than if the officials had authorized, in writing, the sale of intoxicating liquors. No circuitry of action, no indirection or other evasion of this matter, can possibly excuse Leavenworth city, or render the illegal and wrongful acts of its officials harmless and innocent. (*The State ex rel. v. The City of Topeka*, 31 K. 452.) Judgment will be rendered in favor of the plaintiff and against the defendant, as prayed for in the plaintiff's petition. (*State v. Leavenworth*, 36 K. 314.)

1274. A verdict of guilty on one count in a criminal complaint, saying nothing as to other counts, is equivalent to a verdict of not guilty as to such other counts. (*State v. McNaught*, 36 K. 624.)

1275. And where such a verdict has been rendered, and the defendant procures a new trial, he can be tried at the new trial only for the offense charged in the count upon which he was found guilty at the former trial. (*State v. McNaught*, 36 K. 624.)

1276. Where an action is brought under § 18 of the prohibitory liquor law against the owner of premises that have been leased to another, to enforce a lien for the fine and costs which

have been adjudged against the occupant for the unlawful sale of intoxicating liquors, it is not essential to a recovery that the petition or evidence should show that the owner of the premises witnessed or had knowledge of the particular sales upon which the occupant was convicted. It is enough to allege and prove that the premises had been leased to the occupant, and that the owner had knowingly permitted the occupant to use the premises for the unlawful sale of intoxicating liquors, during the time the sales were made upon which the convictions were had. (*Cordes v. State*, 37 K. 48.)

1277. In establishing the ownership of property against which the lien is sought to be enforced, a deed purporting to convey property to the defendants is admissible in evidence, where the description therein given of the property, taken in connection with well-known facts that are in testimony, fairly designates the property described in the petition. (*Seaton v. Hixon*, 35 K. 663; *Cordes v. State*, 37 K. 48.)

1278. An owner of leased premises can only be made liable under this statutory provision when he knowingly permits the occupant to use the premises for the unlawful sale of intoxicating liquors; but knowledge sufficient to excite the suspicions of a prudent man, and to put him upon inquiry, is equivalent to knowledge of the ultimate fact. (*Cordes v. State*, 37 K. 48.)

1279. A person in the lawful and *bona fide* possession of intoxicating liquor may use it as he sees fit; he may drink it himself or give it away, but he cannot by any shift or device in selling or giving away lawfully evade the provisions of the statute prohibiting the manufacture and sale of intoxicating liquors. (*State v. Standish*, 37 K. 643.)

1280. A person cannot be convicted under § 16 of the prohibitory act of 1881 for keeping in his house, store, or in a wareroom thereof, intoxicating liquors for his own use, or for giving the same away, providing the giving away is done honestly and in good faith, and not as a shift or device to evade the provisions of said act. (*State v. Standish*, 37 K. 643.)

1281. *Roberts v. State*, 34 K. 151, followed. (*Durien v. State*, 38 K. 485.)

1282. Where the court before which a person is convicted of a criminal offense, requires such person to give security to be of good behavior for a time not exceeding two years, or to stand committed until such security is given; and subsequently such person, not voluntarily, but to prevent himself from being imprisoned, executes with sureties a bond containing the condition prescribed by the court, but having superadded therein material and important words of condition beyond what were required by the court, or authorized by the statute: *Held*, That the bond is invalid. (*Durein v. State*, 38 K. 485.)

1283. In a civil action to enforce the fine and costs as a lien upon real estate of the owner, for the sale of intoxicating liquors in violation of the prohibitory act, under the provisions of §18, ch. 128, Session Laws of 1881, which were assessed against the person using the same, the fine and costs embraced in the judgment in the criminal action are *prima facie* the amount of the lien; and the original judgment for costs can not be changed or corrected by merely showing that a motion to retax the costs in the criminal action was made and overruled, where no evidence was presented in either action showing the specific costs, if any, which were erroneously taxed. (*Pfefferle v. State*, 39 K. 128.)

1284. Where an action is brought to enforce a lien upon real estate for a fine and costs, under said §18 of the prohibitory act; and the title of the real estate is in the name of the wife, the husband is a proper party defendant; and therefore a joint party with his wife, and hence a competent witness in the action. (*Pfefferle v. State*, 39 K. 128.)

1285. Where a civil action is brought by a county attorney in the name of the state, under §18 of the prohibitory act, to enforce a lien for a fine and costs upon real estate, against the owner of premises, who has knowingly suffered a person to sell liquor thereon in violation of law, and the attorney general does not appear in the case, or have any connection therewith,

the county attorney is, for the prosecution and trial of the cause, the sole and only representative of the state; and upon proof that the deeds of the real estate are not in his possession or under his control, certified copies thereof may be read in evidence, with like effect and the same conditions as the original deeds. (Sec. 27, ch. 22, Comp. Laws 1885.) (*Pfefferle v. State*, 39 K. 128.)

1286. Where a chattel mortgage is given to F. & Co. on certain personal property, including intoxicating liquors, and afterward the mortgagor sells all of said mortgaged property except the intoxicating liquors to C., and C., as a part consideration therefor, agrees to pay the mortgage debt to F. & Co., *held*, that such mortgage is void, and C. is not estopped from denying its validity by reason of his agreement to pay the mortgage debt. (*Flersheim v. Cary*, 39 K. 178.)

1287. Where a city of the third class has authority conferred upon it by the legislature to levy and collect a license tax upon druggists, grocers, butchers, etc., with the restriction that the taxes are to be "just and reasonable," an ordinance of such a city, purporting upon its face to be enacted for the levying and collecting of a license tax, but which is a clear and palpable attempt to destroy and forbid a legitimate, necessary and commendable business, is void, and cannot be enforced. Before, however, the courts will interfere and declare a license tax to be unjust or unreasonable, a flagrant case of excessive and oppressive abuse of power by the city authorities in the levying of the license tax must be established. (*City of Lyons v. Cooper*, 39 K. 324.)

1288. An ordinance levying a license tax of five hundred dollars per year upon each druggist having a permit from the probate judge to sell intoxicating liquors in a city of the third class, containing only sixteen hundred people, and where the gross receipts of such a druggist are about a thousand dollars a year, is so unjust and unreasonable as to be an abuse of power, and therefore void. Such a license tax is not for

revenue, but for destruction. (*City of Lyons v. Cooper*, 39 K. 324.)

1289. In a prosecution for a violation of a city ordinance for selling a certain fluid called peach cider as an intoxicating beverage, it is error for the trial court to instruct the jury as a matter of law, that if it contains six per cent. of alcohol, it is intoxicating within the meaning of the ordinance, as this is a question of fact to be determined by the jury under proper instructions. (*City of Topeka v. Zufall*, 40 K. 47.)

1290. Where an appeal to the district court from a conviction in a criminal case before a justice of the peace is taken, such appeal vacates the judgment, and the cause stands for trial in the district court *de novo*, and any evidence competent to establish the charge is admissible. (*State v. Coulter*, 40 K. 87.)

1291. Where, in a prosecution for a violation of the prohibitory law, the complaint does not allege the kind of liquor sold, or to whom sold, but the prosecuting witness intended to charge a sale to one F., and upon such charge defendant is convicted before a justice of the peace, and from such conviction appeals to the district court, and upon trial in the district court, is convicted upon such charge, but upon an alleged sale to one J., and where it is shown that at the time of making the complaint the prosecuting witness had knowledge of the sale to J., and gave his name as a witness, with the names of other witnesses, to the county attorney to sustain said charge, *held*, the evidence of such sale is properly admitted, and if established, sufficient to warrant a conviction under such complaint. (*State v. Coulter*, 40 K. 87.)

1292. Where, on the trial of a charge for the violation of the prohibitory law, it is claimed that the liquor alleged to have been sold was not intoxicating, it is then competent to show sales other than those upon which the state elects to try the defendant, for the purpose of showing the purposes for which said liquor was sold and purchased; and it will make no difference if such sale was included in a complaint, and upon the

counts of which defendant had been acquitted. (*State v. Coulter*, 40 K. 87.)

1293. The state may appeal from a decision of a district court in a criminal action quashing a warrant. (*Junction City v. Keefe*, 40 K. 275.)

1294. When a defendant is arrested and brought before a court, and at his own suggestion enters into a recognizance for his appearance at a subsequent time, he waives all irregularities of the warrant and arrest. (*Junction City v. Keefe*, 40 K. 275.)

1295. Where an ordinance of a city of the second class provides that when a person is brought before the police judge "to be tried upon the charge of being the keeper of a place where intoxicating liquors are unlawfully kept and stored," and provides a punishment therefor, it is sufficient to give the police judge authority to try him. It is too late for the defendant to complain of any indefiniteness of the ordinance as to the time of filing the complaint and the power to arrest him after he has entered into a recognizance and has appealed to the district court from a conviction in the police court. (*Junction City v. Keefe*, 40 K. 275.)

1296. The lien created by § 18, ch. 35, Comp. Laws 1885, in favor of the state for the amount of fines and costs adjudged against a person for selling intoxicating liquors contrary to law, on premises leased to the convicted person, and knowingly suffered to be occupied and used for the unlawful purpose, by the owner thereof, attaches to the leased premises and operates upon them from the date of the conviction of the tenant, and all conveyances of such leased premises made after the date of the conviction, are made subject to such lien. (*Snyder v. State*, 40 K. 543.)

1297. Upon a motion for the rehearing of a cause, the supreme court will only consider such alleged errors as were specifically pointed out by counsel upon the original hearing. (*State v. Coulter*, 40 K. 673.)

1298. Where an incorporated association purchases beer outside of the state of Kansas and brings it into the state and

then sells chips to its members, each chip representing a drink or glass of beer, and then furnishes a drink or glass of beer, for each chip returned by a member, and the beer is drunk as a beverage, and neither the association nor any one of its members has any permit to sell intoxicating liquors, *held*, that the member of the association who sells these chips, and the member of the association who delivers the beer on the return of the chips, and the president of the association who is present at the time and knows of these things, may be prosecuted, convicted and punished for selling intoxicating liquor in violation of the law. (*State v. Horacek*, 41 K. 87.)

1299. Where a contract is entered into between certain attorneys at law and certain other persons engaged in the illegal sale of intoxicating liquors, providing that the attorneys at law shall, for one year, for the monthly compensation of \$80, payable on the first day of each month, defend all cases brought against such persons for violations of the prohibitory liquor laws, and services are actually performed by the attorneys at law under this contract, and are paid for for the first nine months, but are not paid for for the last three months; *held*, (1) that the contract is against public policy, and void; (2) that the attorneys at law cannot recover an additional amount for the value of their services actually performed under the contract, although their services may be worth more than the amount which they have already received. (*Bowman v. Phillips*, 41 K. 364.)

MALICIOUS PROSECUTION.

(See, also, FALSE IMPRISONMENT.)

1300. Article 8 of "An act to incorporate cities of the state of Kansas," (Comp. Laws, ch. 46,) providing that the mayor "shall have original jurisdiction of all offenses against the laws of this state committed within the limits of the city, and by virtue of his office shall be a justice of the peace," taken in conjunction with the criminal code, authorizes the mayor of

Leavenworth to use all the machinery necessary to hold an offender to bail, that may be employed by a justice of the peace. When the mayor is thus sitting, the tribunal is a court within the meaning of § 1, of art. 3, of the constitution and the proceeding is a prosecution. (*Malone v. Murphy*, 2 K. 250.)

1301. In an action for malicious prosecution *semble*, that the rule in measuring damages, which limits them to compensation only, is deemed most nearly logically correct, but *held* that the rule allowing "vindictive damages" will not be disturbed when a change will make no difference in results. The necessity of great caution in giving the rule, recognized. (*Malone v. Murphy*, 2 K. 250.)

1302. "Malice" and "want of probable cause" both held necessary to sustain an action for malicious prosecution; and *held*, that both must be sustained by affirmative proof, found from the testimony as facts. *Semble*, The jury *may* infer malice from want of probable cause, but they are not bound so to infer it. (*Malone v. Murphy*, 2 K. 250.)

1303. A charge to the jury in an action for malicious prosecution, that malice was implied from want of probable cause *held*, erroneous. (*Malone v. Murphy*, 2 K. 250.)

1304. An action for malicious prosecution can be maintained only when the prosecution has terminated and the defendant has been discharged or acquitted. (*Gillespie v. Hudson*, 11 K. 163.)

1305. Where certain evidence complained of is not brought to the supreme court, the supreme court cannot tell whether error was committed in receiving it or not. (*Marbourg v. Smith*, 11 K. 554.)

1306. In an action for malicious prosecution where the record of the action claimed to have been prosecuted maliciously reads as follows: "And now come" *the plaintiffs*, "and show to the court that this case is settled, and dismiss said case at the cost of the said plaintiffs," and the court then renders judgment dismissing said action at plaintiffs' costs, *held*, that there

is no such settlement or judgment shown as will bar the action for malicious prosecution. (*Marbourg v. Smith*, 11 K. 554.)

1307. And where counsel for defendant in the said action alleged to have been prosecuted maliciously, agreed, without any authority from their client, that the dismissal of said action should be a bar to an action for malicious prosecution, *held*, that such agreement was and is a nullity. (*Marbourg v. Smith*, 11 K. 554.)

1308. Where an action has been dismissed at plaintiffs' costs and not commenced again, such dismissal is a sufficient termination of the suit in favor of the defendant as will authorize him to commence an action for malicious prosecution. (*Marbourg v. Smith*, 11 K. 554.)

1309. Where a party in moving for a new trial does not merely follow the language of the statute and ask for a new trial on the ground of "error of law occurring at the trial and excepted to by the party making the application," but specifically and very minutely points out the errors of which he complains, and for which he asks a new trial, the motion is amply sufficient, and such practice should be encouraged rather than discouraged. (*Marbourg v. Smith*, 11 K. 554.)

1310. An action for malicious prosecution may be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and terminated, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case. (*Marbourg v. Smith*, 11 K. 554.)

1311. To sustain an action for malicious prosecution, it is a sufficient termination of the criminal proceedings out of which it arose if there was a dismissal before trial, and a verdict and judgment on the merits are not essential. (*Kelley v. Sage*, 12 K. 109.)

1312. Where an instruction was asked, that if the prosecuting witness received certain specific information before commencing the criminal proceedings, and believed that information to be true, there was probable cause therefor, and where there

was testimony tending to show other means of information, *held*, there was no error in modifying such instruction by inserting "if he had no other means of knowledge as to that fact." (*Kelley v. Sage*, 12 K. 109.)

1313. The question to be submitted is, whether upon all the information he had or ought to have acquired, the prosecuting witness had probable cause to believe a crime had been committed. (*Kelley v. Sage*, 12 K. 109.)

1314. The criminal law was not designed to be used to enforce the collection of a debt, and a party attempting to so use it should be made to smart therefor. (*Kelley v. Sage*, 12 K. 109.)

1315. In an action for malicious prosecution, where the defendant admitted in his answer, substantially, the whole of the plaintiff's case, except that he alleged that the prosecution, supposed to be malicious, was commenced by the defendant by the advice of counsel, and was with probable cause, and not malicious, and on the day of the trial the defendant, with the permission of the court, struck out of his answer all these admissions, leaving in his answer nothing except a general denial, which put in issue all the allegations of the plaintiff's petition, and the parties then went to trial, the plaintiff relying upon the attendance of a witness who was near where the trial was had, the trial being held in Atchison city and the witness being just across the river in the state of Missouri, and this witness had previously, but irregularly, been subpoenaed in Missouri to attend said trial, and had also promised to do so, and he again, during the progress of the trial, promised to attend, but did not in fact attend, and when it was ascertained that he would not attend the plaintiff made an application for a continuance, on account of the absence of said witness, and the plaintiff filed an affidavit setting up the foregoing facts and other necessary facts, and what he expected to prove by the witness, and the court overruled said application for a continuance, *held*, error; that ordinarily a party is not justified in relying upon a service of a subpoena made outside of the state, when the subpoena was issued in the state, or upon the mere promise of a

witness to attend the trial, but, under the circumstances of this case, where the issues upon which the trial was had were made up on the day of the trial, (the issues being changed from what they had previously been, against the wishes of the plaintiff,) the plaintiff might very properly rely upon such a service and such a promise. (*Knauer v. Morrow*, 23 K. 360.)

1316. In an action to recover for a malicious prosecution and false imprisonment, the defense was, that the defendant acted upon the advice of counsel. As it did not appear from the whole testimony that defendant had stated all the facts to his counsel, a verdict for plaintiff will not be set aside as against the evidence. (*Clark v. Baldwin*, 25 K. 120.)

1317. In such a case the damages were assessed at one hundred dollars. The evidence showed that the plaintiff incurred expenses of twenty dollars, was wrongfully accused of a felony, was confined in jail nearly three full days, and contracted a severe cold while imprisoned, from the consequence of which he suffered ill health. *Held*, That the damages are not excessive; and *further, held*, that if the jury had returned a much greater sum as their verdict in the case, we would not feel at liberty to interfere. (*Clark v. Baldwin*, 25 K. 120.)

1318. Where some of the facts necessary to constitute a cause of action are stated in the petition only inferentially, such petition may nevertheless be held good, where no objection is made to it, except by objecting to the introduction of any evidence under it on the ground that it does not state facts sufficient to constitute a cause of action. (*Bailey v. Dodge*, 28 K. 72.)

1319. The question whether the plaintiff in an action for malicious prosecution may introduce evidence tending to show the financial condition of the defendant, for the purpose of enhancing damages, discussed in the opinion, but not decided. The court below did not err in this case in excluding evidence. (*Bailey v. Dodge*, 28 K. 72.)

1320. Where a party asks the court to give several separate written instructions to the jury, and the court refuses to give any of them, and a general exception is taken to such refusal,

held, that the exception is not sufficient. (*Bailey v. Dodge*, 28 K. 72.)

1321. Where errors are assigned, but not insisted upon in the brief of counsel, the supreme court will generally not consider them. (*Bailey v. Dodge*, 28 K. 72.)

1322. In an action for malicious prosecution it was shown that the defendant filed with a justice of the peace an affidavit for a search warrant to search the plaintiff's house, which affidavit stated that certain goods had previously been feloniously taken, stolen and carried away by the plaintiff, and that they were then concealed in the plaintiff's house; and there was ample evidence introduced on the trial tending to show that the plaintiff had reasonable and probable cause for believing that these statements were true; and the defendant himself testified on the trial, among other things, as follows: "I thought that the facts set forth in the affidavit were necessary to prove the search warrant. I believed the facts therein stated to be true at that time, and I believe so yet." And there was no evidence introduced in the case tending to show that the defendant did not have reasonable and probable cause for believing that the statements made in the affidavit were true, and nothing to show that he did not have reasonable and probable cause for commencing the supposed malicious prosecution. *Held*, (1) That a verdict in the action for malicious prosecution in favor of the plaintiff and against the defendant is against the law and the evidence; (2) that although it was not necessary to state in the affidavit that the plaintiff stole the property, or to state who in fact did steal it, yet that the allegation contained in the affidavit that the property was feloniously stolen, taken and carried away by the plaintiff, cannot constitute the basis for an action of slander or libel. (*Bailey v. Dodge*, 28 K. 72.)

1323. Where a party files a complaint upon which he causes the arrest of another for an alleged crime, it is no defense to an action for malicious prosecution, that the complaint was technically defective; so long as it was treated by the justice and officer as sufficient, and the defendant was in fact arrested

thereon, the party filing it is estopped from questioning its sufficiency. (*Parli v. Reed*, 30 K. 534.)

1324. In an action for malicious prosecution, the question of probable cause is one of law for the court. If, upon the undisputed facts, there was no probable cause, it is the duty of the court to so find, and so instruct the jury. (*Parli v. Reed*, 30 K. 534.)

1325. Where, if all that is believed or suspected of the defendant be true, he has committed no crime, there is no probable cause to believe him guilty. (*Parli v. Reed*, 30 K. 534.)

1326. A party cannot commit the crime of embezzlement in respect to money which is legally and absolutely his own, and this notwithstanding he may be at the time in debt, and does not intend to pay his creditors. (*Parli v. Reed*, 30 K. 534.)

1327. In an action for malicious prosecution, it is no defense that the complaint upon which the warrant of arrest was issued did not state a criminal offense. (*Bell v. Keepers*, 37 K. 64.)

1328. When a written instrument is admitted in evidence, it then becomes the duty of the court to construe and determine its legal effect, the relation of the parties thereto, and to include such determination in the instructions to the jury. (*Bell v. Keepers*, 37 K. 64.)

1329. In an action for malicious prosecution, probable cause is a question of law for the court; and it is its duty to instruct the jury what facts would constitute probable cause. (*Bell v. Keepers*, 37 K. 64.)

1330. To sustain an action for malicious prosecution, it is a sufficient termination of the criminal proceeding out of which it arose, if there was a dismissal by the county attorney without trial. A verdict and a judgment on the merits is not necessary. (*Kelley v. Sage*, 12 K. 109, cited, and approved.) (*Bell v. Matthews*, 37 K. 686.)

1331. In an action for malicious prosecution, the question of probable cause is properly submitted to the jury, when about the facts tending to prove its existence there is a substantial dispute. (*Bell v. Matthews*, 37 K. 686.)

1332. In an action for malicious prosecution, the question of probable cause is primarily one for the court, but if the facts tending to establish the existence or want of probable cause are in dispute, then it is the duty of the court to submit the question to the jury. (*A. T. & S. F. Rld. Co. v. Watson*, 37 K. 773.)

1333. It is generally the duty of the trial court in such a case, where there is a substantial dispute about the facts constituting the existence or want of probable cause, to submit the evidence to the jury, with instructions to determine its credibility and what facts are proved, and that the facts amount to proof of probable cause, or that they do not. The court should group the facts which the evidence tends to prove in the instructions, and tell the jury that if they find such facts have been established they must find that there was or was not probable cause. (*A. T. & S. F. Rld. Co. v. Watson*, 37 K. 773.)

1334. The conduct of a person who commences a criminal prosecution against another must be weighed in view of what then appeared to him to be the acts and declarations of the accused, and not in the light of subsequently appearing facts. (*A. T. & S. F. Rld. Co. v. Watson*, 37 K. 773.)

1335. It is a good defense to an action for malicious prosecution, that the defendant, before commencing the alleged malicious prosecution, it being a criminal prosecution, presented the matter to the county attorney, fairly stating to him all the facts, and then in good faith followed the advice of the county attorney. (*Schippel v. Norton*, 38 K. 567.)

1336. Where a criminal prosecution is commenced before a justice of the peace, and is afterward dismissed with the intention of commencing it again in the district court, and on the same day it is commenced in the district court, *held*, that such criminal prosecution before the justice of the peace cannot constitute the basis of an action for a malicious prosecution while the criminal prosecution is still pending in the district court. (*Schippel v. Norton*, 38 K. 567.)

1337. Where no actual damage is suffered, no exemplary damages can be recovered. (*Schippel v. Norton*, 38 K. 567.)

1338. In an action for malicious prosecution the plaintiff has a right to show by the transcript of the justice of the peace before whom the criminal case was tried, upon which the action for malicious prosecution is founded, that the defendant testified against him on the trial of the criminal charge. (*Sweeney v. Perney*, 40 K. 102.)

1339. On the trial of an action for malicious prosecution, it is not error for the trial court to refuse to permit to be read in evidence that part of the verdict and judgment in the criminal case, for the institution and prosecution of which this action is brought, that finds and adjudges that the complaint was malicious, and without probable cause; and that the name of the prosecuting witness was the name of the defendant in the action for malicious prosecution; and adjudges him to pay the costs. (*Sweeney v. Perney*, 40 K. 102.)

1340. On the trial of such an action, it is error to permit the defendant to testify that he had consulted with certain property owners of the road district, before he had commenced a criminal case against the plaintiff. (*A. T. & S. F. R. R. Co. v. Watson*, 37 K. 773; *Sweeney v. Perney*, 40 K. 102.)

MANDAMUS.

1341. The question whether the plaintiff has sufficient interest in the subject matter of the action to maintain the action, stated and commented on, but not decided. (*Evans v. Thomas*, 32 K. 469.)

1342. In an action of mandamus, where an alternative writ is issued, the defendant may, in his return to the alternative writ, set forth facts which show that he is under no obligation to perform the acts required to be performed by the alternative writ, and may also state in his return that nevertheless he has performed such acts. (*Evans v. Thomas*, 32 K. 469.)

1343. Where separate criminal proceedings are commenced before two justices of the peace against the same person for

the purpose of subjecting him to a preliminary examination for the same offense, and the sheriff of the county has the custody of the accused in both cases, and, under the advice of the county attorney, continues to hold the accused under the proceedings instituted before one of the justices, to wit, Justice H., and refuses to return the accused to the other justice, to wit, Justice E., and the county attorney informs both the sheriff and Justice E. that he wishes to dismiss the proceedings instituted before Justice E., and under the circumstances of the case it would seem that justice would be better subserved by permitting the sheriff to hold the accused under the proceedings instituted before Justice H., in preference to holding him under the proceedings instituted before Justice E., and Justice E. commences an action of mandamus in the supreme court against the sheriff to compel him to return the accused to Justice E., *held*, (1) that the court, exercising a sound judicial discretion, will not award a peremptory writ of mandamus in such case, although the proceedings before Justice E. may have been instituted a few hours earlier than the proceedings before Justice H.; (2) that Justice E. must pay the costs of the action of mandamus. (*Evans v. Thomas*, 32 K. 469.)

MISCONDUCT.

1344. Where notice of appeal to the supreme court was served on the clerk of the district court, but none was served on the defendant, *held* that the appellate court had no jurisdiction to review the judgment and decisions of the court below. Ruling in *Carr v. State*, 1 K. 331, to the same purport, confirmed and applied to this case. Such notice, and evidence of its service, should appear in the transcript; the court cannot assume its existence, nor render judgment without jurisdiction appears to be conferred by the record. (*State v. King*, 1 K. 466.)

NUISANCE.

1345. A trial court in impaneling a jury to serve in a particular case should have and has a very extensive and almost unlimited discretion in discharging a person called to serve on the jury, who might, in the opinion of the court, not make the fittest or most competent person to serve on that jury. But this rule should not be applied in retaining jurors. (*State v. Miller*, 29 K. 43.)

1346. Where a person who is called to serve as a juror in a criminal case, shows by his own oath upon his *voir dire* that he has formed and entertains an opinion with reference to the guilt or innocence of the defendant, and that he has no doubt as to the correctness of his opinion; and that such opinion would remain until removed by evidence; but the juror also, at the same time, states that his opinion is founded on rumor; that he has no bias or prejudice against the defendant; that he would be governed entirely by the evidence in making up his verdict; and that he believes he could try the case impartially: *Held*, That such a person is not a competent juror for that case. (*State v. Miller*, 29 K. 43.)

1347. Where an averment which is necessary to support a particular part of a complaint or information filed in a criminal case, is imperfectly stated, or is stated in very general terms, a verdict or plea of guilty cures the defective averment, although such averment might be bad on demurrer or motion to quash. (*State v. Knowles*, 34 K. 393.)

1348. A complaint filed under § 317, ch. 31, Comp. Laws of 1879, which, omitting court, title and verification, reads as follows: "J. P. Mayfield, being duly sworn, on oath says: That on the 26th day of July, A. D. 1883, in the county of Sumner and state of Kansas, Franklin E. Knowles and Thomas J. Garland were then and there the owners and occupiers of out lot 'B,' in O. R. Godfrey's addition to the city of Wellington, in Sumner county, in the state of Kansas, (except that portion of said out lot 'B' sold by O. R. Godfrey and wife to the

Kansas City, Lawrence & Southern railroad, and described as follows, to wit: Commencing at the southwest corner of said out lot 'B,' running thence east 200 feet; thence north 150 feet; thence west 200 feet; thence south 150 feet, to place of beginning,) and were then and there the owners and occupiers of a slaughter house on the above described premises, occupied by them as aforesaid; that hogs, beeves and other animals were then and there, and for a long time prior to said 26th day of July, 1883, had been, slaughtered on said premises and in said slaughter house, by the said Franklin E. Knowles and Thomas J. Garland, and that the said Franklin E. Knowles and Thomas J. Garland while so owning and occupying said slaughter house and said premises, on said 26th day of July, 1883, did then and there unlawfully permit the same to remain unclean, to the annoyance of J. P. Mayfield, J. A. Shaffer, W. A. Travis, F. E. Phelps, A. J. Jones, G. F. Hargus and H. A. Williams, citizens of the said county of Sumner and state of Kansas," held, sufficient, after an entry of a plea of guilty thereto. (*State v. Knowles*, 34 K. 393.)

1349. A complaint filed under §319, of ch. 31, Comp. Laws of 1879, which charges the defendant with putting "the part of a carcass of any dead animal into any river, creek, pond, road, street, alley, lane, lot, field, meadow, or common," but which does not substantially allege that the act of the defendant complained of resulted to the injury of the health or to the annoyance of the citizens of the state or any of them, is insufficient, and a motion to quash such complaint should be sustained. (*State v. Wahl*, 35 K. 608.)

1350. Where a school district brings an action to abate a public nuisance, it must show that it has sustained damages peculiar to itself; it is not enough that such damages are greater than those sustained by the public at large, differing from them only in degree—they must be different in kind. (*School District v. Neil*, 36 K. 617.)

1351. A public nuisance can only be redressed by a public prosecution unless the party complaining suffers some peculiar

damages differing in kind from those sustained by the public at large. (*School District v. Neil*, 38 K. 617.)

1352. Under § 61, ch. 19, Comp. Laws 1885, the police power of the city can only be extended outside of the corporate limits and within five miles therefrom, over such lands as are necessary for hospital purposes and water works; and over these only to the same extent as over public cemeteries. It is not granted over land outside of the city limits not used for such purposes as are designated in express terms by the law governing cities of the second class. (*State ex rel. v. Franklin*, 40 K. 410.)

OPPRESSION.

1353. On a trial of an indictment under § 197 of the crimes act against a sheriff for oppression and partiality in the manner of executing an order of sale in a case, (*Hartwell v. Brawley*, etc.,) and where the indictment was not quashed nor judgment arrested, but where evidence of a judgment and order of sale in a case, (*Hartwell v. Brawley*, etc.,) and another, offered by the state was objected to by defendant below and ruled out under exceptions of district attorney and a verdict rendered for defendant; *held* that it is not a case appealable by the state under § 266, crim. code, there having been no question reserved by the state within the meaning of that section. (*State v. Carmichael*, 3 K. 102.)

1354. In a trial upon an information, under § 207, Gen. Stat., p. 363, against a justice of the peace, charging willful and malicious oppression, partiality, misconduct, and abuse of authority, "in requiring an excessive bond on an appeal from a judgment rendered by him, and in refusing to approve a security on said bond who was in fact sufficient," it is error to instruct the jury that "gross ignorance of law in a case like this amounts to criminal intent." (*State v. Reeves*, 15 K. 396.)

ORDINANCES, CITY.

(See LICENSE; LIQUORS.)

1355. A complaint in a police court of a city of the second class, for violation of one of the city ordinances, sufficiently sets forth the venue where, in the caption, the state, county and city are named, and the complaint in the body thereof states the name of the city, and alleges that said city is a city of the second class, duly organized under and by virtue of the laws of the state, and that the defendant, upon a day therein named, did, within the corporate limits of said city, then and there being, commit the offense charged. (*Smith v. City of Emporia*, 27 K. 528.)

1356. An ordinance of a city of the second class, entitled "An ordinance to regulate and prohibit the running at large of animals," and containing therein provisions for the taking up and impounding of cattle running at large within the corporate limits of the city, contains a title sufficiently extended to embrace also a section prohibiting any person from breaking open the enclosure established by the city as a pound, and forbidding the unlawfully taking and driving therefrom of animals impounded therein. (*Smith v. City of Emporia*, 27 K. 528.)

1357. An ordinance of the city of Emporia—a city of the second class—so far as it prohibits the breaking open of the enclosure established by the city as a needful pen and pound for the use of impounding animals running at large, and the taking away or driving therefrom of animals lawfully impounded therein, without first paying the fees therefor and fixing penalties for violations thereof, is constitutional and valid. (*Gilchrist v. Schmidling*, 12 K. 263; *Smith v. City of Emporia*, 27 K. 528.)

1358. Where a conviction is had for the violation of a city ordinance and an appeal to the district court, the ordinance of the city need not be introduced in evidence. The district court should take judicial notice of such ordinance; but where said ordinance is given in evidence, over the objection of the de-

fendant, *held*, not error. (*Downing v. City of Miltonvale*, 36 K. 740.)

1359. In a city of the second class the records of the city council need not show that an ordinance was adopted by sections; *held*, valid if the journal shows the ordinance was placed on its final passage, and the vote thereon by yeas and nays, and that a majority voted in favor of its passage. (*Downing v. City of Miltonvale*, 36 K. 740.)

1360. Where the record of an ordinance has a note appended thereto, stating, among other things, that the ordinance was duly published, and the date of its publication, *held*, valid unless it is shown that said ordinance was not published, and the burden of such proof rests on the defendant. (*Downing v. City of Miltonvale*, 36 K. 740.)

1361. Sec. 9, ch. 19, Comp. Laws of 1885, providing that "no ordinance shall contain more than one subject, which shall be clearly expressed in its title," is mandatory upon the city council of a city of the second class. (*Stebbins v. Mayer*, 38 K. 573.)

1362. Where a city of the second class passes an ordinance, the title of which is to prohibit animals from running at large in the city, and the first section provides what animals shall be prohibited from running at large, and §2 provides that no person shall keep a dog within the limits of the city without complying with certain regulations, among which is the payment of tax, directing the city marshal of said city to kill all dogs found running at large, whose owners have not complied with such regulations, and making the owner liable for criminal prosecution for failure to comply therewith, *held*, that §2 of said ordinance is in violation of §9, ch. 19, Comp. Laws of 1885, and therefore void. (*Stebbins v. Mayer*, 38 K. 573.)

1363. Where the mayor of a city of the second class directs the city marshal to post notices requiring the owners of dogs in said city to keep said dogs muzzled, and directs that all dogs found running at large without muzzles shall be killed, but no ordinance of said city has been passed authorizing such regula-

tions, *held*, that said notice does not give the city marshal authority to kill dogs found running at large in violation of said notice. (*Stebbins v. Mayer*, 38 K. 473.)

1364. An ordinance of a city of the second class that declares it unlawful for any persons, society, association or organization, under whatsoever name, to parade any public street, avenue or alley of the city, shouting, singing, or beating drums or tambourines, or playing upon any other musical instruments, or doing any other act designed, intended or calculated to attract or call together an unusual crowd or congregation of people upon any of said public streets, avenues or alleys, without first having obtained in writing the consent of the mayor, or in his absence, the president of the city council, city clerk, or city marshal, in the order named, authorizing such parade, is of doubtful delegated power, is unreasonable, does not fix the conditions uniformly and impartially, contravenes common right, and is illegal and void. (*Anderson v. City of Wellington*, 40 K. 173.)

1365. Liberal rules should be applied to complaints filed in police courts for the violation of the city ordinances, and the same strictness of pleading is not required in such cases as in prosecutions for public offenses in the name of the state by information or indictment. (*City of Kingman v. Berry*, 40 K. 625.)

1366. A complaint drawn under a city ordinance prohibiting the placing of an obstruction upon the streets of a city, and providing a punishment therefor, was written in the following words, omitting the heading and verification: "J. W. Pettijohn, being duly sworn, states on oath, that Geo. F. Berry, within the city of Kingman, state of Kansas, county of Kingman, did on the 31st day of January, 1887, unlawfully keep and maintain certain barrels of oil on avenue A, near the corner of Main street north, the same not being within three feet of his said store building used by him as a general store, contrary to the ordinances of the said city of Kingman in such cases made and provided." *Held*, Sufficient, where the only objection made

thereto was by a motion in arrest of judgment after a verdict of guilty had been returned. (*City of Kingman v. Berry*, 40 K. 625.)

1367. The police judge before whom the complaint was sworn to signed the jurat attached to the same, but the name of his office was not included in the signature; but it appeared from the transcript of the case brought up to the district court, and upon which the appeal was founded, that the person who signed the jurat was the police judge of the city, and therefore the omission of the officer to couple the name of his office with his signature did not invalidate the complaint. (*City of Kingman v. Berry*, 40 K. 625.)

PEACE, BREACH OF—DISTURBING.

1368. Except in cases of affray, threats, or other misconduct in his presence, a magistrate has no power under the statute to require any one to give bonds to keep the peace, unless a written complaint be first made and filed. (*State v. Coughlin*, 19 K. 537.)

1369. Where a person is charged under § 253 of the act relating to crimes and punishments, with willfully disturbing the peace and quiet of another person and his family, and the county attorney relies for a conviction upon the conduct of the defendant on a particular day, previous conduct of the defendant of a similar character, in connection with other facts, may be shown for the purpose of showing that the conduct of the defendant on the particular day was willful. (*State v. Burns*, 35 K. 387.)

1370. And where such conduct is directed primarily against some person other than the prosecuting witness and his family, and is wrongful and willful, and the natural and necessary consequence of such conduct is to disturb the peace and quiet of the prosecuting witness and his family, and this the defendant knows, a conviction will be sustained. (*State v. Burns*, 35 K. 387.)

PERJURY.

1371. In civil actions the statute seems to provide that instructions reduced to writing and signed by the judge shall, when filed, become a part of the record. But whether instructions so signed and filed, in *criminal* cases, become a part of the record, is not decided. (*State v. Lewis*, 10 K. 157.)

1372. On the trial for perjury, the materiality of the alleged false testimony, is generally a question of law for the court. But if left to the jury and their verdict determines the question of materiality as the court should have instructed them, no error is done to the substantial rights of the defendant. (*State v. Lewis*, 10 K. 157.)

1373. When an information charges an offense at a certain time and place, testimony that the defendant was at that time at a remote place, is *prima facie* material. (*State v. Lewis*, 10 K. 157.)

1374. A failure to enter a plea to an information does not render a subsequent trial so far void that false swearing thereon cannot be perjury. (*State v. Lewis*, 10 K. 157.)

1375. It is alleged that on July 15th, 1885, one B. committed willful and corrupt perjury in Lane county, in making oath to an affidavit which was afterwards filed and used by him in a divorce proceeding pending in Ness county, between him and his wife. At the time of subscribing and making oath to the affidavit, Lane county was unorganized and attached to Ness county for judicial purposes, and was thereby a municipal township of Ness county. Subsequently, and before any criminal proceedings were commenced against B., Lane county was properly organized, and entitled to a district court. *Held*, That the district court of Lane county had jurisdiction of the offense; *and further held*, that the defendant could not be legally tried and convicted of the offense in the district court of Ness county, without his consent and over his objection. (*State v. Bunker*, 38 K. 737.)

1376. In order to constitute perjury, the false oath must be in some material matter. (*State v. Smith*, 40 K. 631.)

1377. Where the false testimony alleged to have been given is inserted in detail in the indictment charging the defendant with perjury, and it clearly appears from the indictment that the testimony alleged to be false was not material to the issues of the case in which it was given, and had no tendency whatever to affect or influence the judgment of the court or jury, the indictment is fatally defective. (*State v. Smith*, 40 K. 631.)

1378. An information in a prosecution for perjury is insufficient where there is no allegation that the false testimony was given in any cause, matter or proceeding before any court, tribunal, public body, or officer. (*State v. Ayer*, 40 K. 43.)

POISON.

1379. The criminal code furnishes its own rules for determining the sufficiency of the pleadings recognized by it. By it the legislature attempted to simplify the system of criminal pleadings, and to close the avenues of escape made by the technicalities interwoven into the old system; and courts must give effect to its provisions according to the rules prescribed by it. (*Madden v. State*, 1 K. 340.)

1380. The requisites of an indictment are specified in §§ 89 and 90 of the criminal code, and are guides for the pleader, from which he ought never to depart. Sec. 96 of the criminal code, providing a large class of defects for the existence of which the indictment may not be quashed, limits the court in the application of the requirements of §§ 89 and 90, and furnishes a different rule for its judgment than it had given to the pleader for his guidance. (*Madden v. State*, 1 K. 340.)

1381. *Held*, That an allegation in an indictment that "Thomas Madden on," etc., "in the county of," etc., "unlawfully, maliciously and knowingly did prepare, mix, and mingle a large quantity, to wit: twelve grains of a certain poison called

cantharides, commonly termed Spanish flies, with a certain quantity of water, to wit: one gill, and a certain quantity of gin, with the intent that one Ann L. Smith, then and there being, should drink and swallow down the said *cantharides*, commonly termed Spanish flies, so prepared, mixed and mingled with the water and gin, aforesaid, with intent, then and there and thereby to do her, the said Ann L. Smith, an injury. And afterward, to wit: on," etc., "in the county," etc., "the said Ann L. Smith, then and there not knowing the *cantharides*, commonly termed Spanish flies, aforesaid, to be so prepared, mixed and mingled with the water and gin aforesaid, did then and there drink and swallow down the said *cantharides*, commonly termed Spanish flies, so prepared, mixed and mingled with the water and gin aforesaid, by the said Thomas Madden, in manner aforesaid, whereby great injury was then and there done to the said Ann L. Smith; that is to say, the said Ann L. Smith did, then and there and thereby, become greatly sick and distempered in her body, so that for a long time the life of the said Ann L. Smith was despaired of, contrary to the form of the statute," etc., with the second count, charging the mixture to have been with whisky and water, and the third, with wine and water, does not state the facts constituting the offense "in plain and concise language, without repetition," as directed in the second clause of § 89 of the criminal code. (*Madden v. State*, 1 K. 340.)

1382. Gin and water *construed* to be, in the usual acceptance in common language, drink; and *held*, that a criminal intent is clearly charged. Though at common law the offense should be charged to have been done "feloniously," yet *held*, that it is not a part of the plain language required by the code, and an omission therein *held*, not to "tend to the prejudice of the substantial rights of the defendant upon merits," and not fatal. (*Madden v. State*, 1 K. 340.)

1383. But *held*, that under the sixth subdivision of § 96, declaring that "for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and the

person charged," the indictment shall not be quashed. This indictment, though inartificially and clumsily drawn, must be sustained. (*Madden v. State*, 1 K. 340.)

1384. The crime charged is the mingling of poison with food, drink or medicine, with intent to injure, etc. The allegation that the accused mingled the poison, with intent that Ann L. Smith should drink the mixture, and of the taking of the poison, and its effects, *held* to be surplusage. (*Madden v. State*, 1 K. 340.)

1385. The criminal code, in § 216, has adopted the common-law rule, admitting no separation of the jury, and in § 258, second subdivision, has made that one of the causes for a new trial. A reason for the rule given, and rule laid down as to what would be such misconduct of the jury as would vitiate the verdict in criminal cases. (*Madden v. State*, 1 K. 341.)

1386. When the opportunity for improper influences, prejudicial to the accused, or in his favor, is afforded, if the verdict is against the accused, he is entitled to the presumption that the irregularity has been prejudicial to him, and it is incumbent on the state to show that no such injury could have occurred by reason of the irregularity. (*Madden v. State*, 1 K. 341.)

1387. It was shown, by affidavits filed, that the bailiff in charge of the jury was a portion of the time away from, and out of sight of, the building occupied by them; that a person went into the building and held communication with the jury, in absence of the bailiff; that the jury separated—part of them, unattended by an officer, left the building, conversed with a person from a back room; that information was given by the bailiff of the state of their deliberations, and that no sworn officer was in charge of the jury a portion of the time. In such a case, in the absence of proof that no injury to the accused could have occurred, by reason of these irregularities, *held*, that it was error in the court below to refuse to set aside the verdict and grant a new trial. (*Madden v. State*, 1 K. 340.)

1388. Where the jury are instructed that administering the

poison is a part of the crime, *held*, error. (*Madden v. State*, 1 K. 340.)

1389. An instruction to the jury "that if they believe, from the evidence, that defendant mixed, mingled and ministered *cantharides* to Ann L. Smith, with the intent to have carnal knowledge of her, and that as a result of such administering of *cantharides*, she, Ann L. Smith, received personal injury, which is a fact for the jury to determine from the evidence, then the jury would be justified in finding the defendant guilty — the law presuming that he intended the natural and probable consequence of his own act, unless he should rebut such presumption by evidence sufficient to satisfy the jury," leaves the jury to find whether or not the defendant performed the acts charged, and the administering of the poison, and upon an affirmative finding of those facts, decides the question of guilty intention to injure, against the accused, as a matter of law, giving as a reason that he intended the natural consequence of his own act. Both the ruling and the reason given for it, deemed erroneous. (Dissenting opinion of COBB, C. J.) (*Madden v. State*, 1 K. 340.)

1390. The doctrine that "one is presumed to intend the natural and probable consequences of his own acts," is not that the court should, but that the jury might, presume the intention from the act. When the courts were allowed to infer such intention, the consequence of the act, when done, was not probable, but certain. The only acts charged against the defendant was mingling poison, from which alone no legal inference could be drawn. Proof of the administering of it would be strong circumstantial evidence of criminal intent, and with all the facts, should have been submitted to the jury, with instructions to find the defendant guilty, if satisfied by the evidence of the criminal intent, as well as the other facts, and not otherwise. (Dissenting opinion of COBB, C. J.) (*Madden v. State*, 1 K. 340.)

POLICE ACT.

1391. The metropolitan police act—ch. 100, Laws of 1887, which provides that the executive council shall appoint a board of police commissioners, is not for that reason invalid, nor does it contravene the constitution by delegating legislative power to the executive council. (*State ex rel. v. Hunter*, 38 K. 578.)

1392. Neither is the act for that reason obnoxious to the constitutional limitation forbidding special legislation. (*State ex rel. v. Hunter*, 38 K. 578.)

1393. Under §1 of the act, the executive council is required to appoint a board of police commissioners for any city of the first class in the state whenever 200 *bona fide* householders of such city, having the qualification of electors, petition therefor. (*State ex rel. v. Hunter*, 38 K. 578.)

1394. The metropolitan police law held valid, following *State ex rel. v. J. H. Hunter*, 38 K. 578. (*State ex rel. v. Hannon*, 38 K. 593.)

1395. Mandamus will not lie to compel the mayor and council of a city subject to the operation of the metropolitan police law to appropriate money and pay the salaries and claims of the officers and servants appointed and employed by the police commissioners of such city. Such salaries and claims are mere debts against the city, the collection of which may be enforced in an ordinary action. (*State ex rel. v. Hannon*, 38 K. 593.)

PRISONERS.

1396. The board of county commissioners of Smith county sued the board of county commissioners of Osborne county, and alleged as a cause of action, that prisoners from Osborne county were confined in the county jail of Smith county, and that, while so confined, they became dangerously sick and needed medical care and treatment; that, by reason of the poverty of such prisoners, medical care and treatment could be procured

only upon the order of the board of county commissioners of Smith county; and that the board made such order, and, in pursuance thereof, medical care and treatment were furnished; and that the board paid for the same. There were no allegations that the board of county commissioners of Osborne county ever made any order or gave any consent that any medical care or treatment should be furnished to such prisoners; nor does it appear that any township trustee or the sheriff of either county ever authorized the same; nor does it appear that the prisoners were then, or ever had been, residents of Osborne county. Under such circumstances, *held*, that the board of county commissioners of Osborne county is not liable to the board of county commissioners of Smith county for the medical care and treatment furnished to said prisoners; that, if medical attendance was necessary in the present case, and if the prisoners were unable to pay for the same, it would be entirely proper for the board of county commissioners of Osborne county, in its discretion, under § 331 of the criminal code, to "allow a moderate compensation for medical services," furnished to the prisoners. (See also Comp. Laws of 1879, ch. 79, p. 593, § 8.) It was not, however, the duty of the board of county commissioners of Smith county, under said § 331 of the criminal code, or under any other section of the statutes, to furnish medical attendance to the prisoners from Osborne county, confined in the county jail of Smith county. (*Smith County v. Osborne County*, 29 K. 72.)

1397. Pending a civil action against a defendant, and prior to the trial thereof, he was imprisoned in the penitentiary under a sentence and conviction for embezzlement for a term less than his natural life, and while thus imprisoned, without the appointment of a trustee to manage his estate or defend the action, a judgment was obtained against him. *Held*, That the judgment is a nullity, and might be revoked or set aside upon proper proceedings had before the court rendering the same. (*Rice County v. Lawrence*, 29 K. 158.)

RAPE.

1398. When a witness on the direct examination has testified that another person, at a certain time, had a certain private disease, and when it is material for the adverse party to show that said disease was contracted prior to the time stated by the witness; he may do so by a cross examination of the same witness. And in such a case the question may be put in the following form: "State, if prior to this occurrence, the girl (naming her) had suffered from any private disease." (*State v. Otey*, 7 K. 69.)

1399. Wide latitude is allowed in cross examinations. (*State v. Otey*, 7 K. 69.)

1400. Objections that an information is not properly verified, are waived by pleading to the merits, and going to trial. (*State v. Otey*, 7 K. 69.)

1401. A verdict finding a defendant "guilty of an attempt to commit a rape," need not state that the defendant did some act toward the commission of the offense. (*State v. Otey*, 7 K. 69.)

1402. One preliminary examination for a criminal offense is no bar to another preliminary examination for the same offense; nor is it any bar to a full prosecution for such offense, although the defendant may have been discharged on the first preliminary examination. A mere preliminary examination does not put the accused in jeopardy, within the meaning of §10 bill of rights constitution. (*State v. Jones*, 16 K. 608.)

1403. An information charging the defendant with "willfully, unlawfully and feloniously defiling a female under eighteen years of age, by carnally knowing her while she was confided to his care and protection by her parents," is sufficient, although it may not allege in terms that the girl's parents were her natural guardians, or that the defendant knew that the girl was under eighteen years of age. (*State v. Jones*, 16 K. 608.)

1404. The offense prohibited by §283 of the crimes and

punishment act, of defiling a female under eighteen years of age, by carnally knowing her while she is confided to the defendant's care and protection, may be committed, although the female may be a person of unchaste character, and may consent to the unlawful embraces of the defendant. (*State v. Jones*, 16 K. 608.)

1405. Where the parents of a girl under eighteen years of age permit a man to take her to his own home, for the purpose that she may be hired by his wife to work in his own family, such girl is so confided to his care and protection, that, if he defile her in the meantime by carnally knowing her, he is guilty of the offense prescribed by said § 233 of the crimes and punishment act. (*State v. Jones*, 16 K. 608.)

1406. A criminal offense was committed in the city of Lawrence. On the next day the defendant was arrested therefor by the city marshal, but was immediately discharged. In eight or nine days thereafter the defendant was again arrested by the marshal, who at this time said to the defendant that "it would be better for him [the defendant] to make a clean breast of it, and tell me [the marshal] all about it." The marshal testified on the trial of this case that he may have said more than this by way of inducement to the defendant to confess; but another witness who was present and heard all the conversation between the marshal and the defendant, testified that this was all that was said by the marshal for that purpose. What the defendant said is not shown, but the defendant himself testified that he made no confession at that time, or at any other time. Afterward, but on the same day, the defendant was put into the custody of a constable to be taken to the county jail. While on their way to the jail, by way of the defendant's mother's house, the defendant made a confession of his guilt to the constable. The constable was not present at the interview between the defendant and the marshal, and no one was present at the time the defendant made his confession to the constable, except the defendant himself. No inducement was at any time held out to the defendant to confess, except the foregoing lan-

guage of the marshal. *Held*, That the said confession must be considered as having been voluntarily made, and that the trial court did not err in permitting said constable to testify on the trial concerning it. (*State v. White*, 17 K. 487.)

1407. An affidavit purporting to state what the evidence of four absent witnesses would be, if present, was read on the trial by the defendant in a criminal prosecution upon an agreement of the county attorney that such affidavit might be read to the jury *as the deposition* of such witnesses. Afterward the court refused (though requested to do so by the defendant,) to instruct the jury to treat said alleged evidence as though said witnesses had been personally present at the trial, and had testified to such evidence on the witness stand; *held*, not error. (*State v. White*, 17 K. 487.)

1408. In a criminal prosecution for a felony, where the court permits the jury to separate during an adjournment of the trial, but fails to admonish them as required by § 235 of the criminal code, "that it is their duty not to converse among themselves, nor to suffer others to converse with them on any subject connected with the trial, or to form or express any opinion thereon, until the cause is finally submitted to them," and the defendant is afterward convicted, and then moves the court for a new trial on the ground of such failure, and of prejudice intervening during such irregular separation of the jury, and on the hearing of said motion it was not shown that nothing transpired during such separation to prejudice the rights of the defendant, but, on the contrary, evidence was introduced tending to show that the rights of the defendant may have been prejudiced by conversation had during said separation, and the court overruled said motion for a new trial and sentenced the defendant to imprisonment in the penitentiary, *held*, that the court erred in not admonishing the jury as required by law, and in overruling said motion for a new trial (*State v. Mulkins*, 18 K. 16.)

1409. While the error in failing to admonish the jury may not in and of itself be considered as a substantial error, still,

the error in overruling the motion for a new trial, must, under the circumstances of this case, be held to be a substantial error. In a case like this, where the court allows the jury to separate, and fails to admonish them as required by law, it will be presumed, in the absence of anything to the contrary, that the rights of the defendant were prejudiced during said separation because of such failure; and *held*, that the burden of proving that the rights of the defendant were not so prejudiced, rests upon the prosecution. (*State v. Mulkins*, 18 K. 16.)

1410. In a criminal prosecution, where a letter, previously written and sent by the defendant to his wife, is not in the custody or control of either the defendant or his wife, nor in the custody or control of any agent or representative of either, but is in the custody and control of a third person, who is the prosecuting witness in the case, such letter may be used as evidence in the case by the prosecution against the defendant. (*State v. Buffington*, 20 K. 599.)

1411. In a criminal prosecution, where the court charges the jury in writing but inadvertently fails at the time to sign some of the instructions embodied in the charge, and to file the same among the papers in the case, but puts them in a safe place, and fifteen days afterward produces them for the defendant to copy into a bill of exceptions, and the defendant so copies them into said bill of exceptions, and the bill is then allowed and signed by the judge, and is duly filed, and the defendant then brings the case with said bill of exceptions to this court, *held*, that although it was error for the court to neglect for fifteen days to file said instructions among the papers of the case, yet that neither that neglect, nor the failure of the judge to sign such instructions for that length of time, under the circumstances of this case, was either a material or fatal error. (*State v. Buffington*, 20 K. 599.)

1412. Other questions mentioned, and held not to be properly presented by the record for consideration. (*State v. Buffington*, 20 K. 599.)

1413. A defect in the verification of an information is waived

by pleading to the merits and going to trial. (*State v. Otey*, 7 K. 69; *State v. Ruth*, 21 K. 583.)

1414. A certificate of an officer charged with the custody of public records that his records show a certain fact, is not, in the absence of express statute, competent evidence of the fact. There should be a certified copy of the records, that the court may see whether the records prove the fact. (*Bemis v. Becker*, 1 K. 226; *State v. Ruth*, 21 K. 583.)

1415. By statute, Ness county was attached to Pawnee county for judicial purposes until it should be organized. The law in reference to the organization of new counties provided that, after certain proceedings had been taken, the governor should appoint commissioners and clerk, and that the county should be organized from and after the qualification of these officers. On the trial of a party in the Pawnee county district court, charged with the commission of an offense in Ness county, it was objected that the district court of Pawnee county had no jurisdiction because of the place of the offense. No evidence was offered as to the organization of Ness county, and the court overruled the objection. *Held*, No error. (*State v. Ruth*, 21 K. 583.)

1416. In order to constitute the crime of rape, it is not essential that the female shall make the utmost physical resistance of which she is capable. If in consequence of his threats and display of force she submit, through fear of death or great personal injury, the crime is complete. (*State v. Ruth*, 21 K. 583.)

1417. B. and M. were charged with an assault with intent to commit a rape on Anna B., the wife of the defendant B. On the trial, the wife testified to certain shameful words and acts of the defendants committed several days subsequent to the date of the alleged offense, showing a willingness on the part of B. that the wife might be debauched by M. *Held*, Irrelevant to the issue; therefore incompetent and sufficiently prejudicial to be material error. (*State v. Boyland*, 24 K. 186.)

1418. Philip Masterson was charged before Geo. M. Everline, a justice of the peace in and for Monroe township, Ander-

son county, Kansas, with the offense of assault with intent to commit rape. The complaint read as follows: "*Before Geo. M. Everline, a Justice of the Peace in and for the County of Anderson, in the State of Kansas.*—THE STATE OF KANSAS, *Plaintiff*, against PHILIP MASTERSON, *Defendant*.—Complaint for Assault with Intent to Commit Rape.—THE STATE OF KANSAS, County of Anderson, ss.—J. N. Cline, being first duly sworn, deposes and says, that on the 10th day of July, 1881, at and in the county of Anderson and state of Kansas, Philip Masterson did then and there unlawfully, willfully and feloniously make an assault upon one Ruth Cline, then and there being, with intent, her, the said Ruth Cline, violently, forcibly, and against her will, then and there unlawfully and feloniously to ravish and carnally know; and deponent prays that process may be issued against the said Philip Masterson, and that he be dealt with according to law.—J. N. CLINE." "Sworn to and subscribed before me, this 29th day of July, 1881.—Geo. M. EVERLINE, *Justice of the Peace*." *Held*, That although the complaint does not state in terms that Ruth Cline was a "female child or woman," that it must nevertheless be presumed from the name, "Ruth Cline," and from the use of the personal pronoun "her," and from the allegations in the complaint, that Ruth Cline was a female person upon whom the offense of assault with intent to commit rape could be committed; and therefore that the complaint is not void because of the failure to state in terms that Ruth Cline was a "female child or woman." (*Tillson v. State*, 29 K. 452.)

1419. The defendant Masterson, being arrested in pursuance of such complaint and being brought before the justice, and being in legal custody, the case was continued; and thereupon the defendant Masterson was discharged upon the following recognizance, to wit: "THE STATE OF KANSAS, *Plaintiff*, v. PHILIP MASTERSON, *Defendant*.—Before Geo. M. Everline, Justice of the Peace of Monroe Township, Anderson County, Kansas.—Whereas, the above entitled action is, this 29th day of July, 1881, continued to the 6th day of August, 1881, now, therefore, I, the

undersigned, bind myself to the state of Kansas in the sum of three hundred dollars for the appearance of said Philip Masterson defendant, before the above-named justice of the peace, on said last-named date, at 9 o'clock A. M., for examination in said cause.—WM. S. TILLSON.” “Approved by me, this 29th day of July, 1881.—GEO. M. EVERLINE, J. P.” This recognizance contained the following among other indorsements: “Assault with intent to commit rape.” *Held*, That the recognizance is not void as to Tillson, because the defendant Masterson did not himself sign the recognizance. (*Tillson v. State*, 29 K. 452.)

1420. And *further held*, that the recognizance is not void as to Tillson because it does not state or describe the offense with which the defendant Masterson was charged; that although it would generally be better for a recognizance itself to state and show in definite and explicit terms the nature and character of the offense with which the accused is charged, yet where the recognizance fails to do so, but still shows, though indefinitely, obscurely and inferentially only, that the recognizance was given in a criminal case, and in a case in which the defendant was charged with the commission of a public offense, the recognizance will not be held to be fatally defective and void merely because of its indefiniteness in this respect, and especially so where the previous portions of the record show definitely, explicitly and in detail the nature and character of the offense with which the accused was charged. (*Tillson v. State*, 29 K. 452.)

1421. Where a defendant in a criminal prosecution is convicted, and he moves for a new trial upon various grounds, among which are the following: “6. The information does not state sufficient facts to constitute an offense. 7. The information and the evidence do not show or prove any offense under the laws of Kansas.” And the court grants the new trial as prayed for in the defendant’s motion; and the court also finds that the information “did not state facts sufficient to constitute the offense of which the defendant is found guilty,” and orders that a new information be filed by the county attorney, which is

done: *Held*, That the defendant, by moving for and obtaining such new trial, has waived his right to subsequently plead former jeopardy. (*State v. Hart*, 33 K. 218.)

1422. In this state, when a new trial is granted on the motion of the defendant in a criminal prosecution, the granting of the same places the party accused in the same position as if no trial had been had. *State v. Hart*, 33 K. 218.)

1423. And after a new trial has been granted on the motion of the defendant in a criminal case, the attorney for the state, with the consent of the court, may enter a *nolle prosequi* without prejudice to a future prosecution, and thereafter the defendant may be put upon his trial, and convicted upon a new information charging the identical offense set forth in the prior information. (*State v. Hart*, 33 K. 218.)

1424. And the same result would follow if, instead of a motion for a new trial being made and granted and a *nolle prosequi* being entered, a motion in arrest of judgment was made by the defendant upon the ground that the information did not state a public offense, and the motion was granted. (*State v. Hart*, 33 K. 218.)

1425. A criminal information under §§ 283 and 31 of the crimes and punishment act, charging the defendant with an attempt to carnally and unlawfully know a female child under the age of ten years, may be sufficient, although the word "rape" may not be used in the information; and *held*, that the information in the present case is sufficient, although the word "rape" is not used therein. (*State v. Hart*, 33 K. 218.)

1426. The exact words used in a criminal statute defining a public offense are never required to be used in a criminal information charging such offense, but any equivalent words, or any words clearly and intelligibly setting forth the offense, are all that are required. (*State v. Hart*, 33 K. 218.)

1427. In a criminal prosecution when the information sufficiently charges the defendant, under §§ 283 and 31 of the crimes and punishments act, with attempting to commit the offense of rape by attempting to carnally and unlawfully know a female

child under the age of ten years, but does not use the word "rape" in charging the offense, and the jury finds that the defendant was "guilty of an attempt to commit a rape, as charged," *held*, that the verdict is sufficiently responsive to the information, and is valid. (*State v. Hart*, 33 K. 218.)

1428. In a criminal prosecution under §233 of the crimes act, the information stated, among other things, "the said — did willfully, unlawfully and feloniously defile one — by carnally knowing her, she the said — being then and there a female under the age of eighteen years, confided to the care and protection of said —." *Held*, That the words "then" and "there" grammatically refer to the female as being under the age of eighteen years at her defilement; and also that at the time of her defilement she was under the care and protection of the defendant. (*State v. Sipe*, 38 K. 201.)

1429. An appeal from a judgment in a criminal action must be taken within two years after the judgment is rendered, and although the appeal is taken within proper time, yet if it is dismissed for the want of prosecution and is never reinstated, the new or subsequent appeal must also be taken within two years, or it is filed too late. (*State v. McFarland*, 38 K. 664.)

1430. Where an appeal from a judgment in a criminal action is filed in this court, it must contain a transcript of the proceedings of the trial court, certified to by the clerk thereof; and, where the clerk certifies that the record is a copy of the journal entries only, no question relative to alleged errors is presented in the appeal for review. (*State v. McFarland*, 38 K. 664.)

1431. Where a defendant is charged with having criminal knowledge of a female under the age of eighteen years, under §1, ch. 150, Session Laws of 1887; and the female, with whom the criminal knowledge is charged, wholly denies the alleged offense, and says the defendant always acted toward her like a gentleman; and it is not shown that the female has become pregnant, and no result of any medical or other examination of her person is offered on the trial, it is material error, sufficient

to reverse the judgment for conviction, to permit a witness who occupied a room immediately adjoining and below the one where the defendant and the female are alleged to have had criminal intercourse, to testify from the key being turned and the sound of bed springs in their room, that in her opinion the parties were having carnal knowledge of each other. (*State v. Cranford*, 39 K. 257.)

RECEIVING STOLEN GOODS.

1432. A criminal complaint filed in a justice's court, charging among other things that the defendant, certain articles "of the goods and chattels of one M. (who is not the defendant), then lately before feloniously stolen, taken and carried away, *unlawfully* and feloniously did buy and receive," "contrary to the statute in such case made and provided," charges a public offense, although it may not in express terms, but only impliedly, charge that the property was "stolen from another" than the defendant. (*State v. McLaughlin*, 35 K. 650.)

RECOGNIZANCE.

(See VARIOUS CRIMES.)

1433. An instrument in writing, in the form of a recognizance in a criminal proceeding, but which was taken before the clerk of the district court, acknowledged before him, and approved by him is void—said clerk having no authority in the premises. In an action on such instrument, it is error for the district court to permit the same to be introduced in evidence, whatever the other evidence in the case may have been. (*Morrow v. State*, 5 K. 563.)

1434. Where a practicing attorney signed a recognizance for the appearance of a prisoner, *held*, that the law of 1867 (p. 47) was directory, and that where the signing was voluntary, he

could not avoid judgment by reason, merely, of the prohibition of that law. (*Sherman v. State*, 4 K. 570.)

1435. But, *held*, that a recognizance requiring a defendant, in a criminal case, to appear before the *circuit* court of a county (there being no such court) cannot be enforced against the recognizors, by virtue of forfeiture taken in the district court. (*Sherman v. State*, 4 K. 570.)

1436. A recognizance, being of a penal nature, must be strictly construed. (*Sherman v. State*, 4 K. 570.)

1437. Where money deposited by the defendant in a criminal prosecution, and in lieu of bail, has been forfeited in consequence of a failure of such defendant to appear and answer, as required, and an order is made by the court requiring the clerk having custody of the money to turn the same over to the proper county treasury, *held*, that such an order is a final one, within the meaning of the statute, and as such is reviewable on error to this court. (*Morrow v. State*, 6 K. 222.)

1438. Where money has been deposited with the clerk in the place of bail, no such recognizance is required to be entered into or executed by the defendant making such deposit as must be given in other cases, the making of the necessary deposit, and the delivery of the certificate thereof to the sheriff in whose custody he may be, are the only acts required of such defendant in order to his discharge. (*Morrow v. State*, 6 K. 222.)

1439. Where money is deposited in lieu of bail, and the defendant fails to appear, it is only necessary, in order to declare a forfeiture, that the court should direct the fact of the deposit, and of the defendant's neglect to appear, to be entered of record. The forfeiture then follows as a matter of course, and the court has only to direct the clerk to pay the money over to the county treasurer. (*Morrow v. State*, 6 K. 222.)

1440. Where a recognizance in its obligatory part recites that it is made by William P. Gay, Peter Le Page, and William T. Gay, and the condition is, "that if the above bounden William Gay shall appear at the next term of the district court to be holden in the county of Shawnee, there to answer the charge

of grand larceny," *held*, that under proper averments in the petition, it was competent to show by evidence that "the William Gay," who was bound to appear, was William P. Gay. (*Gay v. State*, 7 K. 394.)

1441. A recognizance is not a contract between individuals to which the statute of frauds will apply. It is an acknowledgment of record of a preëxisting debt owing by the cognizors to the state, not as sureties but as principals. (*State v. Gay*, 7 K. 394.)

1442. A recognizance requiring a defendant to appear "at the next term of the district court" of the proper county, but which does not designate any particular day of such term, or of the month, on which he is to so appear, is not void. In such case the defendant is bound to appear on some day during the said next term, and when he does so appear he is bound to remain until permitted to leave by order of the court. (*State v. Gay*, 7 K. 394.)

1443. In a criminal recognizance it is unnecessary to recite the steps in the prosecution which give the officer authority to require the recognizance. All that the recognizance need contain is the penalty, and the condition. (*McLaughlin v. State*, 10 K. 581.)

1444. The strict rule of the common law in reference to recognizances is changed by our statute, and under it it is sufficient if from the whole record "it be made to appear that the defendant is legally in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court for trial for such offense." (*McLaughlin v. State*, 10 K. 581.)

1445. Where a justice of the peace binds over to the district court a person charged with the crime of embezzlement, and takes a recognizance for the appearance of such person to such court, and such recognizance fails to state the value of the money or property alleged to have been embezzled, it will be

presumed that the case was one not within the jurisdiction of the justice to try and determine, but that the defendant was rightfully recognized to appear at the district court, to there answer to the offense charged. (*McLaughlin v. State*, 10 K. 581.)

1446. An instrument in writing, purporting upon its face to be a criminal recognizance, and executed as such, is not void as to those executing it, although it may be in form a penal bond, be signed and executed by the sureties only, and not by the principal, and contains the initials only of the Christian name of the principal. (*Ingram v. State*, 10 K. 630.)

1447. Where the plaintiff properly alleges the execution of a criminal recognizance, and the defendant does not deny the same by an answer, *verified by affidavit*, no question can be otherwise raised as to the due execution of the recognizance. (*Ingram v. State*, 10 K. 630.)

1448. Where the principal fails to appear at court as required by a criminal recognizance, the failure to *call* the sureties or to *enter* the default of the principal on the records, will not defeat an action brought on the recognizance. (*Ingram v. State*, 10 K. 630.)

1449. In an action upon a recognizance, where the plaintiff alleged a default on the part of the principal, but did not allege that the default was ever made a matter of record, and the defendant in his answer denied generally all the allegations of the plaintiff's petition, *held*, that the answer put in issue all material averments of the petition except the execution of the recognizance, and that the court below erred in sustaining a demurrer to such answer. (*Ingram v. State*, 10 K. 630.)

1450. On the continuance of a criminal case in the district court, the witnesses may be required to give personal recognizance for their appearance at the next term but cannot be compelled to give recognizances with sureties. Even though such a recognizance be signed by sureties, it imposes no liabilities on them. (*State v. Lane*, 11 K. 458.)

1451. After a party has been committed for trial on a charge of felony, a writ of *habeas corpus* prosecuted, the amount of

bail reduced, and the accused returned to the custody of the sheriff, that officer has power to take and approve a recognizance. (*Bloss v. State*, 11 K. 462.)

1452. Where a defendant has had a full and fair preliminary examination before a justice of the peace upon a charge for committing a public offense, and none of the evidence introduced on the preliminary examination is reduced to writing, and the other proceedings before the justice had prior to the preliminary examination do not show whether the offense was committed in the county or not, and the defendant is bound over by the magistrate for his appearance at the next term of the district court to answer to said charge, and the defendant, with sureties, enters into a recognizance for such appearance, it will be presumed, in the absence of any showing to the contrary, that the decision of the justice was founded upon sufficient evidence, and said recognizance will be held to be valid. (*Redmond v. State*, 12 K. 172.)

1453. The original complaint made in a criminal proceeding for the arrest and examination of an alleged offender, has spent its force when the warrant of arrest is issued. The preliminary examination is had upon the warrant of arrest, and not upon the original complaint. (*Redmond v. State*, 12 K. 172.)

1454. The original complaint and warrant of arrest may charge one offense, and the defendant may be bound over for another, if it shall appear on the examination that he is guilty of a public offense other than that charged in the warrant. In such a case, in justice to the defendant a new complaint ought to be filed, but the statute does not in terms require it. (*Redmond v. State*, 12 K. 172.)

1455. A minor who is a defendant in a criminal proceeding may bind himself personally by a recognizance, entered into by himself and sureties, for his personal appearance at the next term of the district court to answer to a charge for committing a criminal offense. Under our statutes, may be held and treated as a contract. (*State v. Weatherwax*, 12 K. 463.)

1456. In an action upon a forfeited recognizance, given upon

the continuance of a criminal cause from one term to another, an allegation of the filing of an information, an order of continuance, etc., is sufficient, without averring a prior arrest and preliminary examination or a waiver of it. (*Jennings v. State*, 13 K. 80.)

1457. The warrant of commitment issued upon a continuance is a process of the court, and should be under the seal of the court and signed by the clerk, and should not be under the hand of the judge. (*Jennings v. State*, 13 K. 80.)

1458. Where the information is not preserved in the record, it will be presumed that it sufficiently and fully charged a crime of which the court had jurisdiction; and then a warrant which refers to the filing of the information and states generally the character of the crime, without stating the particular facts and circumstances of the case, or the county in which the crime is charged to have been committed, will be held sufficient. (*Jennings v. State*, 13 K. 80.)

1459. An omission to file and record the recognizance as required by § 144 of the criminal code, before the forfeiture, is not such an omission as will defeat a recovery. (*Jennings v. State*, 13 K. 80.)

1460. A description of the district court of Cloud county as the "twelfth judicial district court sitting in and for the county of Cloud," is not a misdescription, though perhaps unnecessarily full. (*Jennings v. State*, 13 K. 80.)

1461. Sec. 154 of the criminal code has made radical and sweeping changes in the rules of decision in actions on forfeited recognizances, and under it the old decisions are of little value as authority in this state. (*Jennings v. State*, 13 K. 80.)

1462. In a petition on a forfeited recognizance it is not necessary to insert a copy of the order of forfeiture, or to allege that it was "duly made." (*Rheinhardt v. State*, 14 K. 318.)

1463. An objection to testimony which does not specify the ground of objection, is too general to be available. (*Rheinhardt v. State*, 14 K. 318.)

1464. The order in which testimony is received upon the

trial, is largely within the discretion of the trial court, and unless it appears that such discretion has been abused, is not ground for reversal. (*Rheinhart v. State*, 14 K. 318.)

1465. It is enough to sustain the proceedings of a justice of the peace and sheriff, in respect to the arrest, examination and bail of alleged offenders, so far as the question of their power to act is concerned, that they are officers *de facto*. (*Rheinhart v. State*, 14 K. 318.)

1466. A justice of the peace holds his office until a successor is qualified, and if a party has once been elected and qualified, and at a subsequent election is reelected but fails to qualify, he nevertheless remains a justice *de jure*, as well as *de facto*, until a successor is qualified. (*Rheinhart v. State*, 14 K. 318.)

1467. Where the question of the sufficiency of a petition is raised for the first time and only by an objection to the introduction of any evidence under it, and not raised otherwise, courts will always construe the allegations of the petition very liberally so as to sustain the petition if it can be sustained; and if anything should intervene between the filing of the petition and the final rendering of the judgment, which could, by a fair and reasonable intendment, be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured. (*Barkley v. State*, 15 K. 99.)

1468. Therefore, where the petition alleged and shows that the instrument sued on was an obligation of the defendants, in the form of a criminal recognizance, taken by a justice of the peace on a preliminary examination in a criminal proceeding, requiring the appearance of one of the defendants at the next term of the district court to answer to the charge of embezzlement, and designated the instrument as a "recognizance;" and alleged that the defendants were at the said next term of the district court three times solemnly called but came not, and made default, and thereby forfeited their "recognizance;" and where the evidence clearly showed that not only the recogni-

zance, but all the other papers connected with the said preliminary examination were duly filed in the district court before said default or forfeiture occurred, and long before the suit on the recognizance was commenced, and no objection was made in the district court to said petition for insufficiency except by objecting to the introduction of any evidence under it, *held*, that the supreme court will not reverse the judgment of the district court rendered in favor of plaintiff and against the defendant on said recognizance, merely because said petition did not in terms allege that said recognizance had ever been filed in the district court. (*Barkley v. State*, 15 K. 99.)

1469. Where the petition alleges that the defendant, G. W. Barkley, as principal, and the defendant Geo. Patterson, as surety, executed the recognizance sued on, and that they made default in not complying with the conditions of their recognizance—the petition giving a copy of the recognizance in full; and the record of the subsequent proceedings in the case shows that the defendant Barkley made his appearance in the case both under the name of “G. W. Barkley,” and “George W. Barkley;” and the record of the default and forfeiture shows that “George Barkley,” as principal and “George Patterson” as surety, made the default; and the recognizance is so described in said last mentioned record—the date, the amount, the name of the justice before whom the recognizance was taken, the parties thereto, and other matters descriptive thereof being given—that there can be no possible doubt but that the persons who executed the recognizance, and who are now sued thereon, made the default charged against them, *held*, that the variance in the name of the defendant Barkley, as stated in the petition, and as stated in the record of said default, is not material. (*Barkley v. State*, 15 K. 99.)

1470. It is not necessary, in a suit upon a forfeited recognizance, that it should be shown that the default or forfeiture was ever in fact entered of record. (*Ingram v. State*, 10 K. 630.) The material question in such a case is, whether a default was actually made or not. And therefore, an answer that merely

alleges that there is *no record* of such default, or forfeiture, states no defense. (*Barkley v. State*, 15 K. 99.)

1471. An action on a forfeited recognizance may be maintained against a person who executed the same to procure his own personal liberty, although such person may have been a minor at the time he executed the same, having a guardian for his property, and although he may have executed the same without the consent of his guardian. (*Weatherwax v. State*, 17 K. 427.)

1472. And such action may be maintained, although the governor may have pardoned the defendant after sentence in the criminal action, and before final judgment on the forfeited recognizance. (*Weatherwax v. State*, 17 K. 427.)

1473. Where a party relies upon the liberal provisions of § 154 of the code of criminal procedure, to sustain his petition, he must see that all the matters named therein clearly appear. (*State v. Crissy*, 18 K. 210.)

1474. In such case the petition must affirmatively show, that the prisoner was discharged from custody by reason of the giving of the recognizance. (*State v. Crissy*, 18 K. 210.)

1475. An action upon a forfeited recognizance can be commenced only after the adjournment of the court at which the forfeiture is taken. (*Morehead v. State*, 20 K. 636.)

1476. In an action on a forfeited criminal recognizance where everything appears regular and in form, except a supposed irregularity which appears from the following words indorsed on the recognizance, to wit: "Taken and acknowledged before me, this 3d day of August, 1880.—WEBB McNALL, *Notary Public*." "Approved by me, this 4th day of August, 1880.—JERRY BRISBIN, *Sheriff*; BENJAMIN F. CLOSSON, *Under Sheriff*;" and the petition sets forth and alleges everything that is necessary to be set forth or alleged, and among other things, that the "Recognizance was duly taken and approved by the sheriff," and that the principal recognizor, for whose benefit the recognizance was entered into, was duly discharged "By reason of the acceptance of said recognizance." *Held*, That the petition

states facts sufficient to constitute a cause of action, and that the words above quoted as being indorsed on the recognizance do not render the recognizance illegal or void. (*State v. Kurtz*, 27 K. 223.)

1477. After the examining magistrate had adjudged upon a preliminary examination that an offense had been committed; that there was probable cause to believe the defendant guilty, and had fixed the amount of bail required of the defendant for his appearance at the trial court, without issuing a warrant of commitment or taking bail, upon the word of his father and the consent of the constable, he permitted the defendant to go with his father, promising that he would release him upon his giving a good bond. Within five days thereafter the magistrate accepted and approved a bond signed by the father of the defendant and four other sureties, to the effect that the defendant would appear before the district court for trial for the offense alleged against him. *Held*. That the permission to the defendant to go with his father did not oust the justice of jurisdiction, or release the defendant; and the recognizance having been accepted and approved with the understanding of the parties that by reason thereof the accused was to be discharged, such bond is not invalid or void on the ground that the defendant was not legally in custody at the time it was given and accepted. (*State v. Terrell*, 29 K. 563.)

1478. Where the district court directs bail to be taken in the penalty of \$1,200, and the sheriff requires and accepts from the principal and his sureties a bond in the sum of \$1,250, the bond is utterly void, as the sheriff is only authorized to require bail in such an amount as is directed by the court. The provisions of such § 154 of the criminal code do not apply to such a case. (*Roberts v. State*, 34 K. 151.)

1479. Proof cannot be offered by the surety that the default of the principal was excused unless the acts relied on to excuse the default, and which rendered the performance of the condition of the recognizance impossible, have been pleaded by such surety. (*Madden v. State*, 35 K. 146.)

1480. Where an answer in substance and effect is a denial that the recognizance sued on had been executed by him, a verified reply by the plaintiff denying the allegations of the answer was unnecessary. (*Madden v. State*, 35 K. 146.)

1481. A surety is liable on a forfeited recognizance although it was signed by him when it was incomplete, where the blanks are afterward filled up and the instrument completed and delivered in his presence and under his direction. (*Madden v. State*, 35 K. 146.)

1482. Where a surety claims and testifies that he signed the recognizance only upon the condition that another should join him as co-surety, proof that he was led to sign it by other considerations, such as indemnity furnished or property turned over to him by the prisoner, is not incompetent. (*Madden v. State*, 35 K. 146.)

1483. In an action upon a recognizance where the issue was whether the recognizance was for \$1,200 or \$1,250, and if the recognizance was for \$1,200 it was valid, but for \$1,250 it was void, and the recognizance was introduced in evidence, which shows upon its face that it had originally been drawn for \$1,250, and it was uncertain from the face of the instrument whether the words "& fifty" were so erased as to make it a \$1,200 recognizance or not, but probably not, it was a question for the jury to determine upon the instrument and the other evidence whether such words were erased or not, and if erased, when; and it was not error as against the plaintiff, the state of Kansas, for the court to instruct the jury as follows: "In this case the burden is upon the plaintiff to satisfactorily explain the alteration in the recognizance sued on in this action as to the amount of the penalty therein named." (*State v. Roberts*, 37 K. 437.)

1484. In an action upon an ordinary criminal recognizance, conditioned "that the defendant will be and appear before the said court on the first day of the regular term thereof and not depart the same without leave," *held*, that the surety is discharged, if it be established that the defendant personally appeared at the time and place named in the recognizance; was

present during the trial; at the rendition of the verdict; when the sentence was pronounced against him; and immediately thereafter was taken into custody under the sentence and judgment of the court by the sheriff. If the defendant departs subsequently with the leave of the court, or sheriff, his recognizance cannot be forfeited, or his surety held liable thereon, as the recognizance is not conditioned that the defendant or his surety shall pay or satisfy the judgment. (*Moorehead v. State*, 38 K. 489.)

1485. A judgment upon a forfeited recognizance will be approved, when it appears that it was given for the appearance of a person charged with a crime, that he was legally in custody, that he was released because the recognizance was given, that he failed to appear at the district court of Reno county, and that it was duly forfeited, although the court was not named therein specifically, when it appears that it was headed "State of Kansas, Reno County," and was conditioned that defendant appear before "said district court" at a day named, when it further appears that defendant was committed to jail on a *mittimus* from Reno county, and that the recognizance was duly filed in the office of the clerk of the district court of said county. (*Norton v. State*, 40 K. 670.)

1486. Where a defendant in a criminal action enters into a bond before an examining magistrate to appear at the district court, the conditions of the bond are not complied with, if he merely appears at court and departs the same without leave before trial or judgment. (*Glasgow v. State*, 41 K. 333.)

1487. Sec. 53, ch. 82, Comp. Laws of 1885, authorizes an examining magistrate to require a defendant in a criminal action to enter into a recognizance for his appearance at the court where such defendant is to be tried; and where the defendant gives one, conditioned to appear at such court to answer the charge against him and not depart therefrom without leave, it is valid and within the provisions of said section. (*Glasgow v. State*, 41 K. 333.)

RESISTING OFFICER.

1488. Where it appears from an order of replevin, that it was issued out of the district court of the county in which it was served; that it was duly addressed to the sheriff of the county; that it stated the names of the parties to the action; that it commanded the sheriff to take the property described in the writ, deliver it to the plaintiff and make due return of the order; and was also signed by the clerk of the court in his official capacity, and authenticated with the official seal of the court, *held*, that the process is not void, notwithstanding the absence of a statement in the body of the order, of the court in which the action was brought. The omission can only be considered an irregularity, and is not fatal to the validity of the writ. (*State v. Wilson*, 24 K. 50.)

1489. The officer, in executing the order of delivery in a replevin action, has authority to take into possession the property therein mentioned before delivering a copy of the order to the person charged with the unlawful detainer of the property, or leaving the copy at his usual place of residence. (*State v. Wilson*, 24 K. 50.)

REWARD.

1490. A prisoner in custody in Montgomery county, for an offense under the laws of the state committed in that county, was transferred for safe keeping from the jail of such county to the county jail of Franklin county, and while confined there escaped from the jail. S., the sheriff of Montgomery county, offered a reward of \$50 for the delivery of the escaped prisoner to him at Independence in said Montgomery county. D. and C., acting on the knowledge that a reward had been offered, and with a view to obtain it, captured and secured the prisoner and took him back to the county seat of Franklin county, and there met the sheriff of said Franklin county, who demanded the prisoner by virtue of his office, and D. and C. delivered up

the prisoner to such sheriff as his legal custodian, and claimed the reward offered. Soon thereafter S. came to such county seat and received the prisoner from the sheriff of Franklin county, and took him back to Independence. *Held*, That D. and C. are entitled to the reward, notwithstanding the interposition of the sheriff of Franklin county, and notwithstanding that S. came to Franklin county and received the prisoner there, instead of having him delivered at Independence. (*Stone v. Dysert*, 20 K. 123.)

ROAD, OBSTRUCTING.

(See ORDINANCES.)

1491. When the defendant owns a certain piece of land, and it is uncertain from the county records and otherwise whether any public road has ever been laid out across it, and such supposed road has never been opened by any competent authority, and there is but very little travel upon it, and the defendant believing that such road has no legal or valid existence, plows up the same along with his other land, and plants corn thereon, and also, for the purpose of protecting his crops, places posts across such road so as to obstruct the same, *held*, that such conduct on the part of the defendant does not render him guilty of *willfully* obstructing a public road, even if said road was legally laid out and established. (*State v. Cummerford*, 16 K. 507.)

1492. The supreme court cannot order a judgment to be rendered against the prosecuting witness in a criminal prosecution where such prosecuting witness has not been brought before the supreme court, and has had no opportunity of being heard before such court. (*State v. Cummerford*, 16 K. 507.)

1493. A tract of land included within the 200,000 acres retroceded by the treaty of November, 1854, to the Shawnee Indians, and thereafter patented to one of the tribe, and by such patentee conveyed by approved deed, is, notwithstanding the proviso to the first section of the act of admission, within

the territorial limits of the state of Kansas, and wholly subject to its laws. (*State v. O'Laughlin*, 29 K. 20.)

1494. Where the question is as to the existence of a highway, and it appears that in 1865 the legislature ordered the establishment of a state road, and named the commissioners to survey and lay off such road, and from the oral testimony of one of the commissioners that they did, in fact, with one, Stuck, the county surveyor, lay off such road, and make and file with the county clerk a report of their proceedings, and the records of the county board contain orders reciting the filing of said report, approving it, and ordering the road opened; and where there is found in the clerk's office a survey and map of said road made by said county surveyor Stuck, which, though bearing no file marks, is shown to have been one of the papers in said office from about the time of the survey, and to have been used and referred to as the official map and survey of said road; and where it further appears, that shortly after such survey, the travel conformed to the line established by it, and that it was worked as a public highway by the road overseer: *Held*, That upon an inquiry made twelve years thereafter, as to the validity of such highway, it will be deemed to have been satisfactorily proved, although the report of the commissioners cannot be found among the papers of the county clerk's office. (*State v. O'Laughlin*, 29 K. 20.)

1495. Where one obstructs a public road or highway by the erection and maintenance of a mill dam for the sole purpose of supplying water power to run and operate a grist, flour and exchange mill owned by him, and the back water from the mill pond formed by the dam renders the road unsafe for crossing, and practically impassable, and to the notification of the road overseer that the back water from the dam and mill pond totally obstructs the road, insolently answers the road overseer that "if he wants the water removed, to warn out his men, and dip it out with buckets," *held*, such a person is liable to the penalty for a willful obstruction of the public road, under the provis-

ions of § 17, ch. 89, Comp. Laws of 1879. (*State v. Raypholtz*, 32 K. 450.)

1496. When a board of county commissioners appoints viewers to view and lay out a public road, the board exhausts its jurisdiction for the time being, and has no jurisdiction to proceed further in the establishment of the road until other jurisdictional facts are brought into existence. (*State v. Horn*, 34 K. 556.)

1497. Where such viewers have been appointed, but do not act or make any report to the county board, but one of the viewers in conjunction with a stranger acts and makes a report, *held*, that the county board has no jurisdiction to establish the road. (*State v. Horn*, 34 K. 566.)

1498. Where the record of the county board recites that two of the viewers acted and made a report, but the report itself shows otherwise, *held*, that the report is the better evidence, and must prevail. (*State v. Horn*, 34 K. 566.)

1499. While the supreme court will construe the proceedings of inferior tribunals with regard to mere irregularities with great liberality, so as to uphold such proceedings, yet they will also rule strictly with regard to matters of jurisdiction, for the purpose of keeping such inferior tribunals strictly within the limits of their jurisdiction. (*State v. Horn*, 34 K. 566.)

1500. Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years is not sufficient to constitute it a public highway. (*State v. Horn*, 35 K. 717.)

1501. Where a road has been traveled for more than fifteen years, but has not been established under the statutes of the state, and has not been expressly dedicated nor impliedly dedicated, unless by prescription or limitation, and the land over which it runs was for several of the first years vacant and unoccupied: *Held*, That such road is not a public highway by prescription or limitation, unless the public, by its constituted authorities, took the possession of the road and used it and maintained it as a public highway for at least fifteen years. (*State v. Horn*, 35 K. 717.)

ROBBERY.

1502. Article 5 of the amendments to the constitution of the United States *held* not to be applicable to any other than proceedings in the United States courts, (7 Pet. R. 243,) and that there is no repugnancy between it and the act of the legislature of 1864, providing for the trial of offenses upon information filed. A defendant not coming within the exceptions named in that act, is entitled under it to a preliminary examination, and may plead its omissions, but *held* that it is not necessary that the information should allege such examination or a waiver of it, that being a matter which goes, not to the merits of the trial, but to the regularity of the previous proceedings. (10 Michigan R. 383.) (*State v. Barnett*, 3 K. 250.)

1503. The sufficiency of an information must be determined by the rule governing indictments, and neither can be quashed for such an omission. (Crim. Code, § 96, p. 252.) (*State v. Barnett*, 3 K. 250.)

1504. It is not requisite that the precise time of the commission of an offense should be pleaded if it is shown to have been within the limitation prescribed by statute. (*State v. Barnett*, 3 K. 250.)

1505. Under § 94, Comp. Laws, 251, other words conveying the same meaning as those used in the statute are sufficient in defining a public offense. (*State v. Barnett*, 3 K. 250.)

1506. A charge in an information, that defendant, the property of another, naming him, from the person, in the presence of and against his will, feloniously did take with intent in so doing to rob, etc., *held* to be substantially the offense defined in § 67 of the act concerning crimes and punishments, and, under the liberal rule of construction laid down in the criminal code, *held* to be sufficient. Motion to quash ordered to be overruled. (*State v. Barnett*, 3 K. 250.)

1507. The defendant was charged with the offense of robbery in the first degree. The jury found the defendant guilty as charged. There was not sufficient evidence to sustain a verdict

for robbery in the first degree. The court overruled defendant's motion for a new trial, and sentenced the defendant for grand larceny. *Held*, That the court committed error; that the court should have granted the new trial; that the offense of robbery in the first degree does not necessarily include grand larceny, and that said verdict does not necessarily establish the fact that the defendant was guilty of grand larceny. (*State v. Howard*, 19 K. 507.)

1508. A person convicted of grand larceny, and sentenced to imprisonment in the penitentiary, is not a competent witness in a criminal case while the sentence remains unrevoked, and such person not pardoned. (*State v. Howard*, 19 K. 507.)

1509. Where in the trial of a defendant, charged with the commission of a felony, an affidavit for a continuance is filed by such defendant on account of an absent witness, and the prosecution consents that on the trial the facts alleged in the affidavit shall be read and treated as a deposition of the absent witness, such affidavit cannot afterward be impeached for want of diligence on the part of the defendant in procuring the attendance of such witness, or in taking his deposition as prescribed by law; nor by showing that the defendant had good reason to believe if the witness was present and gave such testimony, it would be untrue; nor by proving the non-existence of the witness therein named. And further, *held*, that such affidavit should be read and treated in all respects as the deposition of the absent witness. (*State v. Roark*, 23 K. 147.)

1510. A defendant in a criminal prosecution is entitled, under the constitution, to compulsory process to compel the attendance of witnesses within the jurisdiction of the court, in his behalf. (*State v. Roark*, 23 K. 147.)

1511. Where material and necessary witnesses are duly subpoenaed in behalf of an accused, in a criminal prosecution, and such witnesses are within the jurisdiction of the court, *held*, error to force said accused to trial and to conclude the trial, against his protest, before the return of the compulsory process issued to bring the disobedient witness into court, in the ab-

sence of any reason for it not being executed and returned. (*State v. Roark*, 23 K. 147.)

1512. In a criminal prosecution upon information, the county attorney may file another information whenever the original information has been lost or destroyed. (Crim. Code, § 118.) And this may be done in all cases where the original information has been duly and legally filed, and has afterward been lost or destroyed, although no preliminary examination may have been had in the case, and although no copy of the original information may have been preserved. (*State v. Plowman*, 28 K. 569.)

1513. In a criminal prosecution, where the defendant has made a motion for a continuance on account of the absence of testimony, and filed an affidavit stating what the absent testimony is, and the county attorney agrees that the testimony of the witnesses may be introduced in evidence on the trial; and the trial is then commenced, and the defendant has these absent witnesses subpoenaed, and claims that they will be present at sometime during the day of the trial, but they do not appear during the trial, and the court compels the defendant to close his evidence without the oral testimony of these absent witnesses; and it further appears that this testimony is incompetent in the case: *Held*, That the court did not commit any error in compelling the defendant to close his evidence without the oral testimony of said witnesses. (*State v. Plowman*, 28 K. 569.)

1514. *Held*, Under the circumstances of this case, that the information, although inartistically drawn, is sufficient. (*State v. Plowman*, 28 K. 570.)

1515. Where an application is made by the defendant in a criminal prosecution for a continuance, on the ground of the absence of material testimony which he has been unable to procure, and the court at first sustains the application, and the county attorney then agrees to permit the testimony to be introduced in evidence, and the court then overrules the application, *held*, that the court did not, by first sustaining the application, lose all jurisdiction of the case for the term, and thereby

render all further proceedings had in the case at that term void. (*State v. Plowman*, 28 K. 569.)

1516. After a verdict of "guilty" has been rendered in a criminal prosecution, the court, without making any additional finding, or any finding of its own in the case, renders a judgment upon the verdict, sentencing the defendant, *held*, not erroneous. (*State v. Plowman*, 28 K. 569.)

1517. An information for robbery which describes the property as "twenty-five dollars in money, the property of John Bond," and without any allegation of its value, or any excuse for want of greater particularity, is fatally defective. (*State v. Segermond*, 40 K. 107.)

SLANDER.

1518. Under our statutes the stealing of a dog is larceny, and words charging that, are actionable *per se*. (*Harrington v. Miles*, 11 K. 480.)

SHOOTING.

(See ASSAULT.)

1519. Where the record shows that the grand jury in a body came into court, and through their foreman presented to the court six bills of indictment, each indorsed "a true bill" and signed by the foreman, and that at that term the grand jury of the state in and for the county, naming it, duly impaneled, sworn and charged to inquire within and for said county, through their foreman (naming him), presented to the court sundry bills of indictment, which are recorded, and among which is the record of one against the defendant, *held*, that the record shows affirmatively, that the indictment was returned into court by the grand jury. (*Millar v. State*, 2 K. 174.)

1520. Where the appellant was tried upon a *copy* of the indictment, as found on record, and not upon the original bill signed by the foreman, *held* that as it would have been proper

to show by affidavit that the original bill had been lost or destroyed, and that the omission to file such affidavit, or to place it upon record if filed, would be merely a "technical error or defect" within the meaning of §276, of the criminal code (Comp. L., 1862, p. 276), and must be disregarded. (*Millar v. State*, 2 K. 174.)

1521. *Held*, That §32, of the "act relating to crimes and punishments," making no distinction as to the degree of the offense, an indictment founded on that section need not state the degree of the offense of which the jury found the defendant guilty. The indictment in the case held to be sufficiently "direct and certain as to the party and the offense charged," as required by §90 of the said act. (*Millar v. State*, 2 K. 174.)

1522. The lands known as the "Delaware Reserve," so far as the administration of justice, to persons not belonging to the Delaware nation or tribe, is concerned, form an integral part of the counties within whose boundaries they are included, and *held*, that the boundaries of Leavenworth county are defined by the statute. (*Millar v. State*, 2 K. 174.)

1523. A charge by the court to the jury "that the allegation on purpose and of malice aforethought in the indictment, must be established beyond a reasonable doubt, the same as any other allegation or material fact," that "this purpose need not be conceived any length of time before the act, nor need the malice aforethought exist days or hours before; it is sufficient if just before the act was committed, the defendant conceived the purpose of killing Stigers." He did it then, "on purpose and with malice aforethought," *it is conceived*, might have been justly and properly used to the jury in connection with other instructions, and the proper and legal proofs of the commission of the offense, and where the bill of exceptions does not purport to give the whole of the charge, the whole of which with the evidence might have been therein embraced, and does in fact give no more than the words excepted to. *Held*, That the presumption, in absence of proof to the contrary, is, that it was so given. (*Millar v. State*, 2 K. 174.)

1524. The term "penitentiary," *held* to be an English word in common use, signifying a prison or place of punishment, in which convicts sentenced to confinement and hard labor, are confined by the authority of the law. (*Millar v. State*, 2 K. 174.)

1525. Where in an action in which the charge is shooting with intent to kill, the question is one of self defense, it is error to instruct the jury that if as a matter of fact the defendant was in no imminent danger they must convict. (*State v. Howard*, 14 K. 173.)

1526. The rule is, that if the defendant had reasonable grounds to apprehend that he was in imminent danger, he is justified in defending himself. (*State v. Howard*, 14 K. 173.)

1527. The common law rules of construing criminal pleadings have been set aside by our code of criminal procedure, and to that code must we look for the rules to determine the sufficiency of an information or indictment. (*Smith v. State*, 1 K. 365; *State v. White*, 14 K. 538.)

1528. It is not necessary in an information to use the exact words of the statute in charging an offense; it is sufficient if words are used conveying the same meaning. (*State v. White*, 14 K. 538.)

1529. The omission of the words, "on purpose and of malice aforethought," from an information charging an assault with intent to kill, under §38 of the crimes act, is not fatal, where the information charges that the defendant did feloniously make an assault, and feloniously did shoot and wound, with the intent feloniously and willfully to kill. (*State v. White*, 14 K. 538.)

1530. Upon a trial on the charge of an assault with intent to kill, where there is evidence tending to show the intoxication of the accused at the time of the act, it is proper for the court to charge the jury that intoxication is a matter to be considered by them as bearing upon the state of defendant's mind, and therefore as evidence upon the question of the intent to take life. But it is seldom if ever the duty of the court to go further, and instruct, that the jury may from the intoxication alone infer the absence of any such intent, and the consequent

innocence of the defendant of the specific offense charged. At least, in the absence from the record of the evidence in the case, it is impossible for an appellate court to hold that there was any error in the rulings of the trial court refusing the latter and giving the former instructions. (*State v. White*, 14 K. 538.)

1531. The fact of intoxication, no matter how complete and overpowering, is not conclusive evidence of the absence of an intent to take life. (*State v. White*, 14 K. 538.)

1532. A defendant in a criminal case cannot bring to this court on appeal the ruling of the district court sustaining a demurrer on the part of the state to a plea of *autrefois acquit*, until after the trial and judgment on the merits. (*State v. Horneman*, 16 K. 452.)

1533. To an indictment charging a shooting with intent to kill, defendant plead, that he had once been tried and acquitted under a charge of maliciously shooting and wounding a horse, and that the shooting charged in the two prosecutions was one and the same shooting. *Held*, That a demurrer to this plea was properly sustained. (*State v. Horneman*, 16 K. 452.)

1534. No juror should be induced to agree to a verdict by a fear that a failure to so agree will be regarded by the community as reflecting either on his intelligence, or his integrity. Personal considerations should not influence his conclusions; and the thought of them never should be presented to him as a motive for action. (*State v. Bybee*, 17 K. 462.)

1535. Where upon a charge of assault with intent to kill, the testimony runs in two lines, one tending strongly to prove the full crime charged, and the other to prove an *alibi*, and that the defendant was innocent of any offense, and where it appears that for a long time the jury were unable to agree, and that after having been unable to agree for many hours they are brought into court, and the duty of agreement is strongly urged upon them by the court, who intimates, that it would be a reflection on them not to agree, that there should be concession in matters of detail and minor importance; that they shall bring their minds together as an apothecary mixes different in-

redients and ascertains the product, and that they need not hope to be discharged for a long time; and where the whole tendency of this instruction is to impress too strongly upon the jury the duty and necessity of coming to some agreement, and thereafter the jury return a verdict of guilty of an assault only: *Held*, That such verdict ought not to be permitted to stand; that it is too apparently a compromise between those believing defendant guilty of the crime of assault with intent to kill, and those believing him guiltless of any offense, induced wholly or in part by the urgent instructions of the court upon the duty of agreement. (*State v. Bybee*, 17 K. 462.)

1536. Where a motion for a new trial in a criminal case is made upon the ground that one of the jurors had not resided six months in the state, and therefore was not an elector or a qualified juror, and the affidavits in support of the motion simply show the fact of such disqualification, and that it was unknown to the defendant until after the verdict, and it does not appear from the record that any preliminary examination was made of the juror as to his qualifications, or that he made any false statements with respect thereto, or that any fraud or imposition was practiced upon the defendant, or even that the defendant's counsel was, at the time of impaneling the jury, ignorant of such disqualification, *held*, no error to overrule the motion. (Horton, C. J., *doubting*.) (*State v. Hinkle*, 27 K. 308.)

1537. A criminal prosecution was commenced before a justice of the peace by the filing of a verified complaint. Pending the proceedings in the justice's court, the complaint was amended, on motion of the county attorney, by a change in the name of the party against whom the crime was charged to have been committed. After such amendment, no reverification was had. The defendant was convicted, appealed to the district court, and there the case went to trial. After the impaneling of the jury, the district court permitted the filing of a new and amended complaint, and thereupon such new and amended complaint was filed, duly verified, and the trial was had upon

such amended complaint. *Held*, No error. (*State v. Hinkle*, 27 K. 308.)

1538. In order to correctly interpret that provision of § 16, art. 2 of the constitution, which provides that "No bill shall contain more than one subject, which shall be clearly expressed in its title," its object must be taken into consideration; and the provision must not be construed or enforced in any narrow or technical spirit, but must be construed liberally on the one side, so as to guard against the abuse intended to be prevented by it, and liberally on the other side, so as not to embarrass or obstruct needed legislation. (*State v. Barrett*, 27 K. 213.)

1539. Where such new and amended complaint failed to allege in what county or state the offense charged was committed, and before the case was submitted to the jury the attention of the court was called to this defect, and no amendment made or asked to remedy it, *held*, that a conviction was improper, and cannot be sustained; and this notwithstanding the fact that immediately after the filing of such amended complaint, defendant made a motion to set it aside upon several grounds, not including the defect as to the place of offense, which motion, upon the grounds named therein, was properly overruled. (Horton, C. J., *dissenting*.) (*State v. Hinkle*, 27 K. 308.)

1540. It is not incumbent on the trial court to accept and adopt in its charge to the jury the instructions as framed and requested by the parties, even though they may be appropriate and state the law correctly. If the principles contained in the instructions refused are embraced and fairly stated by the court in its general charge, there is no ground of complaint. (*State v. Tatlow*, 34 K. 80.)

1541. Where the question submitted to the district court upon a motion for a new trial was the alleged intoxication of a member of a jury while the case was on trial, and upon which there was competent but conflicting oral testimony, the finding of the trial court thereon will be accepted as controlling in this court. (*State v. Tatlow*, 34 K. 80.)

1542. The mere drinking of intoxicating liquors by a juror

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during the progress of the trial, unless it is furnished to him by the prevailing party, is not of itself sufficient to set aside the verdict; and the fact that the juror was under the influence of intoxicating liquor during the recess of the court, but had recovered therefrom before the trial was resumed, while it is improper conduct, to be severely condemned, will not overturn the verdict unless there is reason to believe that the misconduct in some way influenced the verdict. (*State v. Tatlow*, 34 K. 80.)

1543. Where a criminal information is filed nineteen days before the commencement of the term of court, and the defendant causes a subpoena to be issued six days before the commencement of such term for a witness who resides in the county in which the court convenes, and the officer by mistake serves the subpoena upon the wrong person; and the defendant, five days before the commencement of such term causes another subpoena to be issued for such witness, and this subpoena is served upon the witness at his usual place of residence, and not upon him personally; and the defendant again, on the day on which the court convenes, causes another subpoena to be issued for such witness; and the case being called for trial on that day, the defendant moves for a continuance of the case to some subsequent day of the term, or to the next term, and supports his motion by affidavit, and the affidavit sets forth the foregoing facts and what would be the testimony of the witness if he were present, and such testimony is material; and the court overrules the motion, and requires that the defendant shall immediately proceed to trial: *Held*, Error; that up to that time the defendant had used sufficient diligence to procure the attendance of such witness, and that the continuance should have been granted. (*State v. Burwell*, 34 K. 312.)

1544. Where a criminal information sets forth facts sufficient to constitute the offense of assaulting and wounding a person with intent to commit murder, under § 38 of the act relating to crimes and punishments, and the facts as thus set forth also constitute the offense of wounding under such circumstances as would constitute manslaughter if death had ensued, under § 42

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of the crimes and punishments act, *held*, that the jury may find the defendant guilty of either of the offenses charged, as the evidence will justify. And generally, wherever a person is charged upon information with the commission of an offense under one section of the statutes, and the offense as thus charged includes another offense under another section of the statutes, the defendant may be found guilty of either offense. (*State v. Burwell*, 34 K. 312.)

1545. Where a defendant in a criminal prosecution has been found guilty by the jury, and the defendant to support his motion for a new trial offers to prove by the testimony of the foreman of the jury that he, the foreman, was "misled by the form of the verdict, and would not have signed it had he known its real meaning," and the court refuses to permit such testimony to be introduced, *held*, not error. (*State v. Burwell*, 34 K. 312.)

1546. An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in evidence. (*State v. Whittaker*, 35 K. 731.)

1547. Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury, not warranted by the facts in evidence, is erroneous; and unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside. (*State v. Whittaker*, 35 K. 731.)

1548. In a prosecution for an offense which includes others of a less degree, and there is even slight testimony which tends to show that the offense committed was lower in degree than the one specifically charged, it is the duty of the court to define such lower degree, and instruct the jury upon the law applicable thereto. (*State v. Evans*, 36 K. 497.)

1549. The testimony in this prosecution examined, and found to warrant the instructions that were given. (*State v. Evans*, 36 K. 497.)

1550. Where an information, charging a defendant with an attempt to kill K. and O. by having D. shoot off a loaded revolver through a window into a room where they were sleeping, contains two counts, the first averring the attempt to kill K. and the second the attempt to kill O., and after conviction upon both counts the defendant was sentenced upon the first only, and a *nolle prosequi* was entered as to the second, *held*, that the trial court committed no error prejudicial to the substantial rights of the defendant in refusing to quash the information or compel an election, as the matters charged in the information arose out of the same transaction, and as the proof on both counts was precisely the same, and as no evidence was admitted to sustain the second count, not pertinent to the first. (*State v. Fisher*, 37 K. 404.)

STOCK.

1551. Where a person pastures a bull over one year old on his own *inclosed* premises, through which a railroad is constructed and operated, and the railroad company has not inclosed its road with a fence, as required by the provisions of the railroad stock law of 1874, (Comp. Laws of 1879, ch. 84, art. 2, pp. 784, 785,) and the bull is killed by the railroad company in the operation of its road, *held*, that the bull was not so running at large, within the meaning of § 38, art. 5, of the act relating to stock, (Comp. Laws of 1879, ch. 105,) as to prevent the owner from recovering for its value under the provisions of said railroad stock law of 1874. (*Gooding v. A. T. & S. F. Rld. Co.*, 32 K. 150.)

1552. And so *held*, although the railroad company may own the strip of land upon which its track is located, and where the animal was killed. (*Gooding v. A. T. & S. F. Rld. Co.*, 32 K. 150.)

TRESPASS.

1553. In a complaint before a justice of the peace for an offense created by statute, it is sufficient, as a general rule, to describe the offense in the words of the statute. To this rule there are some exceptions, but this is not one of the excepted cases. (*State v. Armell*, 8 K. 288.)

1554. Sec. 1 of ch. 113, Gen. Stat., provides redress in two ways for certain wrongs done to the property of individuals, one by a criminal prosecution; the other by a civil action to recover damages. In the civil action the allegation of *value* is necessary as a predicate for testimony, and also to determine jurisdiction. In the criminal prosecution it is not necessary for either purpose. The two proceedings are not in anywise dependent upon each other. Either or both methods may be resorted to, as may be deemed best. (*State v. Armell*, 8 K. 288.)

1555. The condemnation of 100 feet in width as a right of way for a railroad, gives the railroad company no right to enter upon and dig ditches through the adjacent lands through which the right of way has been so condemned, even though such ditch is necessary to the proper drainage and protection of the railroad. (*State v. Armell*, 8 K. 288.)

1556. The United States is a "person" within the meaning of § 1 of the "act to prevent certain trespasses," which makes it an offense for any person to cut down, injure or destroy, or take or remove any tree, timber, rails or wood, "standing, being or growing on the land of *any other person*," etc. (*State v. Herold*, 9 K. 194.)

1557. Where a party brings a case to the supreme court and fails to bring any of the evidence that was introduced on the trial below, it must be presumed that the evidence was all against him and that it sufficiently proved all the material facts found against him. (*State v. Herold*, 9 K. 194.)

1558. Where the evidence is all one way, and unquestionably proves the fact for which it was introduced, the court may

tell the jury that the fact is proved, and instruct them to find accordingly. (*State v. Herold*, 9 K. 194.)

1559. Where, according to public treaty the United States on October 14, 1868, became the exclusive owner of a certain tract of land known as the "Sac and Fox Diminished Reservation," proof that a certain smaller tract of land is a part of this reservation is some proof that the government owned the land at a time when a certain trespass was committed thereon. (*State v. Herold*, 9 K. 194.)

1560. Where a party files a bill of particulars in the form of a bill of account for "timber taken and received from" a certain tract of land, (describing it,) designating the number of pieces of timber so taken, and the value of each, and aggregate value of the whole, such bill of particulars as a pleading, discloses an action on an account, and not one for trespass on real estate. (*Bernstein v. Smith*, 10 K. 60.)

1561. A question not properly raised by the record will not be reviewed or considered by an appellate court. (*State v. Boyle*, 10 K. 113.)

1562. A criminal case must be removed from the district court to the supreme court on appeal, and not on petition in error. (*State v. Boyle*, 10 K. 113.)

1563. When a statute is repealed and the repealing statute is silent as to whether the rights and remedies which have accrued under the repealed statute shall be abrogated or not, § 1 of the "act concerning the construction of statutes," (Gen. Stat. 998,) will have the force and effect to save and preserve all such rights and remedies, whether they belong to the state or to individuals, and in criminal as well as in civil cases. And a criminal action pending under the repealed statute at the time it is repealed may be prosecuted by virtue of said saving statute to final determination and judgment, notwithstanding such repeal. (*State v. Boyle*, 10 K. 113.)

1564. In misdemeanors there are no accessories, but all persons concerned therein, if guilty at all, are principals. (*State v. Furness*, 14 K. 111.)

1565. Declarations made by a person in possession of land, as to the extent of his possession, are admissible as part of the *res gestæ*. (*State v. Gurnee*, 14 K. 111.)

1566. Where a paper is made out in duplicate, and it is shown that one of the originals is lost, and the other is in the rightful possession of a person on trial for an offense, there is sufficient foundation laid for the introduction of a copy of the paper, as there is no power in the court to compel the accused to produce the paper as evidence against himself. (*State v. Gurnee*, 14 K. 111.)

1567. It is not error to refuse to admit testimony tending to show that a witness had notice of a contract when no such contract is shown to have had an existence, and where, as in this case, the witness to whom the knowledge is sought to be brought home is not the party to be affected by the testimony. (*State v. Gurnee*, 14 K. 111.)

1568. Competent evidence tending to prove any material fact in a case is admissible, although it may not be conclusive or competent to prove another fact in issue. (*State v. Gurnee*, 14 K. 111.)

1569. Where a general assertion is made in the brief, that a large number of instructions given are erroneous, and no particular error is pointed out, and no single one of the instructions is indicated as erroneous, this court will not scrutinize them with great care, but will presume that if there was material error in any one of them it would be suggested. (*State v. Gurnee*, 14 K. 111.)

1570. On a charge of malicious trespass, in cutting and carrying off a crop of growing wheat, under § 107 of the crimes and punishment act, it is not necessary to aver or prove that the owner of the wheat was the owner in fee of the land on which the wheat was growing. (*State v. Gurnee*, 14 K. 111.)

1571. If an award in writing is not signed by the arbitrators, it is not binding on the parties; but if they accept the award, and arrange their possession of land in accordance therewith, it is not error for the court to refuse an instruction as to the in-

sufficiency of the award, which instruction contains no limitations of the rule arising from the acceptance of the award. (*State v. Gurnee*, 14 K. 111.)

1572. Where it is alleged that the trial court erred in its rulings, it is the duty of the party complaining to indicate wherein the error consists as well as the particular ruling of which he complains. (*State v. Jennerson*, 14 K. 133.)

1573. In criminal as well as civil cases where the facts are agreed, this court can determine what conclusions are to be drawn therefrom as readily and fully as the trial court. (*State v. Sullivan*, 14 K. 170.)

1574. Where a party is charged under § 2 of ch. 113, General Statutes, with having voluntarily and unlawfully thrown down a fence other than that "leading into his own inclosure," and where it is agreed that defendant and the prosecuting witness occupied with enclosed fields separate portions of the same tract, the right to purchase which from the government they were contesting, that defendant had built a house within the limits of his field which he had been for months occupying as his home, that his west fence was along a county road, through which fence he was accustomed to pass to and from his house at a place where there was a "slip rail gap, or a loose rail," and that the prosecuting witness had a few days before the alleged offense built around the inclosure of defendant an outer fence, which along the county road was but eighteen inches or two feet from defendant's fence, *held*, that the defendant had committed no offense under the statute in removing that portion of this outer fence in front of the "slip gap" in his own fence, so as to permit his passage to and from the county road. (*State v. Sullivan*, 14 K. 170.)

1575. An information attempting to charge an offense under § 26 of ch. 122, Laws of 1876, p. 287, to authorize a conviction of a defendant should contain an averment of the amount of damages committed, or of the value of the property injured. (*State v. Grewell*, 19 K. 189.)

1576. Under § 2 of ch. 113, General Statutes of 1868, a

civil action to recover damages cannot be joined and tried with a criminal prosecution instituted for a violation of said section; nor can the complainant in the criminal prosecution provided for in said statute recover in such proceeding any judgment for wrongs done to his property. The civil and criminal actions therein provided are not in anywise dependent upon each other. Either or both methods may be resorted to, as may be deemed best. (*Manville v. Felter*, 19 K. 253.)

1577. Where an action is commenced before a justice of the peace under ch. 113 of the General Statutes, both as a civil and a criminal action, and is afterward carried through that court and the district court to the supreme court, where the judgment of the district court is reversed, because of the improper joinder of a civil with a criminal action, and the cause is then remanded to the district court for further proceedings, where the person who first instituted the action moves for leave to amend the bill of particulars so as virtually to dismiss the criminal branch of the action, and leave the civil branch for further prosecution, with himself as the plaintiff, and the district court overrules the motion, and then on motion of the defendant dismisses the entire action, *held*, that, in view of the peculiar language of said statute, which seemingly authorizes the joinder of such actions, the court should have permitted the amendment upon the payment of such proportion of costs already accrued, as could reasonably be chargeable to the criminal branch of the case. (*Felter v. Manville*, 23 K. 191.)

1578. On a charge of malicious trespass in severing from a freehold growing corn, under § 107 of the crimes act, the complaint must set forth that the owner of the growing corn had either constructive or actual possessory right in the land on which the corn was growing; otherwise the complaint will be fatally defective. The case of *The State v. Gurnes*, 14 K. 111, distinguished. (*State v. Haney*, 32 K. 428.)

1579. A complaint, filed under § 1, ch. 113, Comp. Laws 1885, charging one B. with having, on October 11, 1887, in the county of Saline, state of Kansas, unlawfully cut down grass in

which he, the said B., had no interest, or right, said grass standing upon land not belonging to said B., but being the property of O., and being the southwest quarter of section 2, township 14 south, of range 5, west of the sixth principal meridian, is sufficient, under the statute. (*State v. Armell*, 8 K. 288; *State v. Blakesley*, 39 K. 152.)

TRIAL.

1580. A criminal trial once commenced must be carried through to its close, and a failure to finish it is equivalent to an acquittal of the defendant. Jurors were and are summoned only for the term. Process for witnesses loses its force at the end of the term. (*Butler v. McMillen*, 13 K. 391.)

VENUE.

1581. The trial of a defendant charged with a criminal offense cannot, upon the motion of the prosecutor or state, and against the objection and without the consent of the defendant, be removed out of the county and district where the offense is alleged to have been committed. (*State v. Knapp*, 40 K. 148.)

1582. Where a defendant in a criminal cause applies for a change of venue from the county where the offense is alleged to have been committed, to some other county in the same judicial district, upon the ground that he cannot obtain a fair trial where the prosecution is pending, and against his objection and without his consent the district court changes the place of trial to a county embraced in another judicial district, the defendant does not thereby waive his constitutional right to object to being tried in the judicial district to which the cause is removed. (*State v. Knapp*, 40 K. 148.)

PART II.—PRACTICE.

ACCESSORIES.

1. In misdemeanors there are no accessories, but all persons concerned therein, if guilty at all, are principals. (*State v. Gurnee*, 14 K. 111.) The statute authorizes the charging of an accessory before the fact as principal, and the record of the conviction of the principal is proof *prima facie* of that fact; but this is not conclusive, and other evidence of the commission of the crime by the principal is admissible. (*State v. Cassady*, 12 K. 550; *State v. Mosley*, 31 K. 355.)

2. The proof of guilty knowledge and combination to carry on a general stealing is admissible to prove accessory before the fact. (*Lewis v. State*, 4 K. 309.) Whether one who outside the state is accessory before the fact to a felony committed within the state, can be punished in this state—*quære?* (*State v. Cassady*, 12 K. 550.) No appeal can be had till final order. (*Cummings v. State*, 4 K. 225.)

3. Where a conviction is had on testimony of an accomplice, corroboration does not have to be in every material matter. (*Craft v. State*, 3 K. 479; *State v. Adams*, 20 K. 312.) Accomplice used by the state, as a witness, is not entitled to his discharge as a matter of right; (*Cummings v. State*, 4 K. 225;) while declarations of an accomplice, made after the consummation of a crime, as to the manner of its commission, are hearsay and inadmissible, yet it is competent to show his acts, with accompanying and qualifying statements, pending and in aid of the commission of the offense, or in disclosing the place and person where and upon whom the offense was committed. (*State v. Cole*, 22 K. 474.)

AMENDMENT.

4. Where a defendant is tried, convicted and sentenced before a police judge for the violation of a city ordinance, and the defendant then appeals to the district court, and there the original complaint is quashed, it is error for the district court then to permit a new and amended complaint to be filed in the district court and to allow the defendant to be tried, convicted and sentenced on this new complaint, against his objections. (*Burlington v. James*, 17 K. 221.) Pending the proceedings in the justice's court, the complaint was amended, on motion of the county attorney, by a change in the name of the party against whom the crime was charged to have been committed. After such amendment, no reverification was had. The defendant appealed to the district court. After the impaneling of the jury, the district court permitted the filing of a new and amended complaint, duly verified, and the trial was had upon such amended complaint. *Held*, No error. (*State v. Hinkle*, 27 K. 308.) An information alleging defendant *did*, and locating offense future time, may be amended at trial. (*State v. Cooper*, 31 K. 505.) And it is not error in a criminal case for the court to permit a slight amendment to be made to the verification of the information. (*State v. Gould*, 40 K. 258.)

APPEAL.

5. A criminal case must be removed from the district court to the supreme court on appeal, and not on petition in error. (*State v. Boyle*, 10 K. 113; *Reisner v. State*, 19 K. 479; *McLean v. State*, 28 K. 372; *State v. Elrod*, 35 K. 639.) An appeal cannot be taken from an order of the district court, which overrules a motion to quash an information, or which sustains a motion for a continuance, while the action is still pending in the district court. (*State v. Freeland*, 16 K. 9.) A prosecution under a city ordinance is a criminal action; and if it is sought to bring the case to this court for review, it can be

done only by appeal; (*Neitzel v. City of Concordia*, 14 K. 446;) and where before the police judge of a city, for an alleged violation of a city ordinance, a motion is made by the defendant to quash the complaint, the city cannot take an appeal directly to the supreme court. (*City of Leavenworth v. Weaver*, 26 K. 392.)

6. Where a defendant convicted of a misdemeanor before a justice of the peace appeals to the district court, it is error to compel the defendant to go to trial against his objection upon a complaint found among the papers of the case in the district court, which has not been certified to, nor authenticated in any manner. (*State v. Anderson*, 34 K. 116.) The judgment of a justice of the peace in a criminal case cannot be reviewed on petition in error in the district court, (*State v. Lofland*, 17 K. 390,) and an appeal from a justice's court must be to the district court. (*State v. Harpster*, 15 K. 322.) When the law of 1867 provided for an appeal from the judgment of a justice of the peace in a criminal case, it was error to try such a case as upon a *petition in error*. (*State v. Young*, 6 K. 37.) On an appeal from a judgment of a justice of the peace to the district court, it is the duty of the justice to certify up the original complaint, and not to send a certified copy, and the defendant did not waive his right to object to trial upon a certified copy of a complaint, from the fact that at a prior term he had gone to trial thereon without objection; (*State v. Anderson*, 17 K. 89;) and on appeal from the police court, and complaint being then quashed, it is error to allow a new complaint to be then filed in district court. (*City of Burlington v. James*, 17 K. 221.)

7. On an appeal from justice, case is to be tried on original complaint, unless amended. (*State v. Forner*, 32 K. 281.) Where the transcript is not filed in the supreme court within thirty days after the appeal is taken as prescribed by § 284, criminal code, the appeal will be dismissed; (*The State v. McEwen*, 12 K. 37;) and the transcript, in criminal appeal, must be filed in thirty days after notice. (*State v. McEwen*, 12 K. 37; *State v. McLean*, 28 K. 376.) To enable the supreme court to review a decision of the trial court upon an appeal in a crim-

inal action, a transcript, properly certified, must be filed in the court within the time prescribed by the statute. (*State v. Furney*, 40 K. 17.) In a proceeding in error, the plaintiff is required by the rules of the supreme court to number the pages of the petition in error and the record, and is required to file a written or printed brief which must refer specifically to the pages of the record which he desires to have examined. (*State v. McCool*, 34 K. 613.) In the absence of any notice of appeal, the supreme court has no jurisdiction to review the rulings of a district court; (*State v. Ashmore*, 19 K. 544;) and the service of a notice of appeal on the clerk and prosecuting attorney, in a criminal action brought to this court by the defendant, is an important part of the record and constitutes a necessary step in the appeal, and should appear in the transcript filed, that this court may see and its record show it has jurisdiction of the cause. (*Carr v. The State*, 1 K. 334; *The State v. King*, 1 K. 466; *State v. Teissedre*, 30 K. 210.)

8. The service of the notice of appeal on the clerk and on the appellee or his attorney, according to the requirements of the code of criminal procedure, constitutes the appeal, and upon that alone the jurisdiction of the supreme court, to review the judgment and decisions of the court below, rests. Such notice should appear in the transcript filed. (*Carr v. State*, 1 K. 331.) Attorneys of record of defendants have no power to accept service of notice of appeal by the state. (*State v. Baird*, 9 K. 61.) The notice of appeal in criminal cases must be served on clerk; (*Carr v. State*, 1 K. 331; *McLean v. State*, 28 K. 373;) and in appeal by the state to the supreme court, it is not sufficient to serve the notice of appeal on the counsel of record for the defendant. (*State v. Brandon*, 6 K. 243.)

9. The certificate of the transcript filed must show that the record is a true transcript of all the proceedings had in the cause; otherwise, the decision of that court cannot be reviewed by the supreme court; (*State v. Prater*, 40 K. 15;) and the defendant cannot have the judgment against him reviewed in the supreme court upon anything short of a full and true transcript

of all the pleadings, papers and proceedings which make up the record of the cause; (*State v. Ricker*, 40 K. 14;) and on appeal a criminal case can only be brought to this court by transcript of record. (*State v. Nickerson*, 30 K. 545.) An appearance in the supreme court for the state, by any person not authorized by law to appear for the state, would not cure error in bringing the case improperly to the supreme court, and confer jurisdiction. (*Reisner v. State*, 19 K. 479; *McGilvray v. State*, 19 K. 479.) In a criminal action appealed to the district court, it was adjudged, upon an acquittal of the defendant, that the prosecuting witness should pay the costs. The prosecuting witness brought the case to the supreme court on case made and on petition in error. No appearance was made in the supreme court by either the county attorney or the attorney general. The case was not rightfully brought to the supreme court, and the petition in error must be dismissed; (*Reisner v. State*, 19 K. 479; *McGilvray v. State*, 19 K. 479;) and where the defendant files a copy of the bill of exceptions only, the supreme court cannot examine the alleged errors presented in the brief filed for the defendant, although the bill of exceptions purports to copy the information, orders and judgment of the district court. (*Whitney v. Harris*, 21 K. 96; *Lauer v. Livings*, 24 K. 273; *State v. Lund*, 28 K. 280.)

10. Where the defendant in a criminal action takes an appeal from the judgment of the district court to the supreme court, he must file in the supreme court a transcript of the proceedings of the district court, certified to by the clerk of that court; (*State v. Lund*, 28 K. 280;) and where a judgment is rendered against the defendant for a fine and costs only, and the defendant appeals to the supreme court, the appeal is not so completed and perfected as to stay proceedings in the district court, until proper notices of the appeal have been given, and a transcript of the case has been filed in the supreme court. (*In re Chambers*, 30 K. 450.) A criminal case is brought to the supreme court only in the manner prescribed by statute. The statute prescribes a transcript of the record; hence an original bill of

exceptions is insufficient. But where the clerk, certifying to the original bill, certifies that it contains true and correct copies of the information, verdict, judgment, etc., as to such matters, it must be treated as a transcript, and all allegations of error predicated thereon are open to examination. (*State v. Nickerson*, 30 K. 545.) An appeal in a criminal case from the district court to the supreme court is not completed and perfected until a transcript of the case is filed in the supreme court. (*In re Chambers*, 30 K. 450; *State v. Teissedre*, 30 K. 476.) On appeal to the supreme court, there being no bill of exceptions, that court will not consider any of the numerous questions discussed with reference to the matters above set forth, and will only determine from the face of the record the questions as to the sufficiency of the information. (*State v. Carr*, 37 K. 421.) It is generally the duty of the court to continue the term a sufficient time to afford parties whose cases are tried near to the close of the term a reasonable opportunity to present a bill of exceptions; but a refusal cannot be corrected upon appeal; (*State v. Smith*, 38 K. 194;) and where a party brings a case to the supreme court and fails to bring any of the evidence that was introduced on the trial below, it must be presumed that the evidence was all against him and that it sufficiently proved all the material facts found against him. (*State v. Herold*, 9 K. 194.)

11. Where a private citizen presents to the judge of the district court a complaint in writing and under oath, charging the defendant with the commission of a misdemeanor for which the punishment may be a fine not exceeding \$500, and imprisonment in the county jail not exceeding one year, and demands that a warrant shall be issued for the arrest of the defendant, and that the judge shall hear and determine the case, and the judge refuses, no appeal lies to the supreme court; (*State v. Forbriger*, 34 K. 1;) and the law allows no appeal in a criminal case until its final determination. (*Cummings v. State*, 4 K. 225.) It was questioned whether appeal in criminal case stays execution, where the judgment is, "defendant to be committed

till fine and costs paid;" (*In re Chambers*, 30 K. 455;) but appeal from conviction, "sentenced to pay fine," suspends the judgment. (*State v. Volmer*, 6 K. 379.) And it has now been held that, pending an appeal to the supreme court, in a case for fine and costs, and imprisonment therefor until paid, the entire judgment is suspended. (*City of Miltonvale v. Lanoue*, 35 K. 603; *In re Simmons*, 39 K. 125.) Where the defendant has pleaded "not guilty," and a verdict is rendered, and the court enters judgment that the defendant be discharged and go hence without day, this court cannot, on an appeal, reverse the verdict or judgment. (*State v. Crosby*, 17 K. 396.) Where an independent judgment is rendered under each count, the reversal of the judgment upon one conviction will not disturb or work a reversal of the others. (*State v. Guettler*, 34 K. 582.)

12. The defendant was convicted for violating an ordinance of a city of the third class, and he then appealed to the supreme court. *Held*, That the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court. (*City of Miltonvale v. Lanoue*, 35 K. 603.) Where a defendant appeals from the judgment of the justice to the district court, the judgment is vacated, and the defendant is placed in the same condition as if no trial had been had. (*State v. Forner*, 32 K. 281.) And where an appeal to the district court from a conviction in a criminal case before a justice of the peace is taken, such appeal vacates the judgment, and the cause stands for trial in the district court *de novo*. (*State v. Coulter*, 40 K. 87.) But a defendant in a criminal case cannot bring to this court on appeal the ruling of the district court sustaining a demurrer on the part of the state to a plea of *autrefois acquit*, until after the trial and judgment on the merits; (*State v. Horneman*, 16 K. 452;) and an appeal in a criminal action can be taken by a defendant only after judgment, and an intermediate order of which he complains can be reviewed only on such an appeal. (*Cummings v. State*, 4 K. 225; *State v. Freeland*, 16 K. 9; *State v. Edwards*, 35 K. 99.) On a charge of

selling liquor without license, a finding of not guilty cannot be set aside by appeal or petition in error. (*City of Olathe v. Adams*, 15 K. 391; *City of Oswego v. Belt*, 16 K. 480.) And on a verdict of "not guilty," the state cannot appeal. (*State v. Curmichael*, 13 K. 102.)

13. Where the defendant is acquitted, and the jury find that the prosecution was instituted without probable cause and from malicious motives, and the court sets aside that portion of the verdict and renders judgment against the county for the costs, *held*, that an appeal may be taken by the state to the supreme court. (*State v. Zimmerman*, 31 K. 85.) The state may appeal from a decision of a district court in a criminal action quashing a warrant. (*Junction City v. Keeffe*, 40 K. 275.) On appeal, error in relation to proceeding, in regard to intent to kill, will not be considered on conviction of assault. (*State v. Newland*, 27 K. 764.) An order turning over bail money to county treasurer is reviewable. (*Morrow v. State*, 6 K. 222.) The supreme court has no greater power than district or probate courts in *habeas corpus*, in inquiring into regularity of proceedings. (*Ex parte Phillips*, 7 K. 48.) The supreme court, on appeal, cannot render a judgment against prosecuting witness, when he is not a party to suit in said court. (*State v. Cummerford*, 16 K. 507.) On an appeal by the state it is irregular to quash an information because not filed at the first term of court after arrest and appearance. (*State v. Baird*, 10 K. 58.)

14. An appeal will not lie from an order overruling motion to quash information, or motion sustaining continuance, but must be after judgment. (*State v. Freeland*, 16 K. 9.) Where a defendant is attached for refusing to obey an order directing him to pay temporary alimony and suit money, an appeal lies to the supreme court, when the defendant is sentenced to imprisonment in the county jail until he complies with the order of the court. (*State v. Dent*, 29 K. 416.) A prosecution under city ordinance can only be reviewed by appeal; (*Neitzel v. City of Concordia*, 14 K. 446;) and questioned whether error will lie in prosecution under an ordinance to enforce a private right of

city? (*Neitzel v. City of Concordia*, 14 K. 446.) Where the trial was had on agreed statements, the supreme court can determine what should be the judgment as well as district court; (*State v. Sullivan*, 14 K. 170;) but on appeal the finding for the defendant, on an agreed statement, cannot be set aside, even if agreed statement shows defendant was guilty. (*City of Olathe v. Adams*, 15 K. 391.) A judgment, in criminal case, will not be reversed for immaterial error; (*State v. Winner*, 17 K. 298;) and on an appeal from an order punishing for contempt, the mere question of the advisability of the court's action is not the matter of consideration; it is the question of power, and whether the act or word punished is, in fact, a contempt. (*In re Pryor*, 18 K. 72.)

ARGUMENT.

15. Upon the trial, a defendant rested without testifying. The state offered to prove certain facts, to which the defendant objected. Thereupon the county attorney said, in the hearing and presence of the jury: "Your honor, we had a right to presume that the defendant would testify as a witness in his own behalf, in which case this evidence would have been proper rebuttal, and he having failed to do so, we claim the right to introduce it now." These remarks do not require a new trial. (*State v. Mosley*, 31 K. 355.) But where the prosecuting attorney, in making his argument to the jury, claims that the defendant is guilty because he failed to testify in the case and deny the facts alleged against him, and the defendant is afterward found guilty by the jury, *held*, that for such irregularity on the part of the prosecuting attorney, the defendant, on his motion, should be granted a new trial. (*State v. Balch*, 31 K. 465.) The case however must be reversed, on account of the misconduct of the prosecuting attorney in using the following words in addressing the jury: "If the defendant is not guilty, why did he not take the stand? He could have easily proven that he

did not keep the place.” (*City of Topeka v. Myers*, 34 K. 501.) Where there appears what can be considered as only a slight overstepping of the proper limits of argument to the jury, which is not objected to until the presentation of a motion for a new trial, and the verdict is apparently fully sustained by the testimony, this court ought not to set aside the judgment. (*State v. Yordi*, 30 K. 221.) And where some statements of the county attorney seem to be improper, but it does not appear that they might have had any material effect upon the verdict rendered by the jury, the supreme court will not reverse the judgment; (*State v. Comstock*, 20 K. 650;) and it is not error for counsel, in their argument to the jury, to comment on the omission to introduce testimony, and draw any legitimate inferences from such omission; nor is it improper for them to express their opinions as to the intentions of a party in any transaction in issue or disclosed by the testimony. (*State v. Yordi*, 30 K. 221.) So it is held that a statement by the county attorney that he would show to the jury that the defendant had committed an offense other than the one for which he was being tried, when no such testimony was actually offered or admitted, and when the statement was not objected to, and no prejudice to the defendant appears to have resulted therefrom, is not such misconduct as will overturn the verdict of the jury. (*State v. McCool*, 34 K. 617.)

16. The county attorney stated to the court, “that if the court wishes to open the bars and let us go in and show all about this case, that the defendant has been found guilty of an attempt at manslaughter.” The court promptly advised the jury that the statement was improper, and should be disregarded. The remark is not sufficient cause, under the circumstances, to compel a new trial. (*State v. McCool*, 34 K. 617.) A statement by the county attorney that “the defendant has been guilty of one penitentiary offense, and would commit a greater offense to cover the other up,” when it does not appear in what connection the statement was made, nor whether the county attorney had reference to the offense on trial, and not

objected to, is not sufficient to compel the granting of a new trial. (*State v. McCool*, 34 K. 613.) But counsel, in his argument to the jury, should confine himself in his statements of fact to the matters in evidence. If he travel outside the case, and assert to be facts matters not in evidence, he is guilty of misconduct, for which he may be punished personally; (*Winter v. Sass*, 19 K. 556;) and it is not misconduct for the county attorney, during his closing argument in a criminal trial, to read from the notes of the official reporter of the court, portions of the testimony upon which he desires to comment. (*State v. McCool*, 34 K. 613.) It is the duty of the district courts to interfere of their own motion in all cases where counsel in argument in jury trials, state pertinent facts not before the jury, or use vituperation and abuse, predicated upon alleged facts not in evidence, calculated to create prejudice against a prisoner. (*State v. Gutekunst*, 24 K. 252.) It is not error to request ladies to withdraw from the court room when counsel are about to comment upon testimony which was vulgar. (*State v. McCool*, 34 K. 617.) The court below did not err in limiting the argument of counsel to the jury to four and a half hours on each side. (*State v. Riddle*, 20 K. 711.)

ARRAIGNMENT.

17. A failure to enter a plea to an information does not render a subsequent trial so far void that false swearing thereon cannot be perjury; (*State v. Lewis*, 10 K. 157;) and a failure to arraign the defendant and have a formal plea of not guilty entered is not such an omission and error as will entitle the defendant to a new trial or to an arrest of judgment, when the defendant was present in person and by counsel, announced himself ready for trial upon the information, went to trial before a jury regularly impaneled and sworn, and submitted the question of guilt to their determination. (*State v. Cassady*, 12 K. 550.)

ARREST OF JUDGMENT.

18. An objection to an indictment commencing as follows: "In the second judicial district, sitting in and for the county of Doniphan, March term, 1862. *The State of Kansas v. Alfred Guy*: Indictment. The jurors of the grand jury, selected, impaneled and sworn in and for the body of said county, charged to inquire of offenses committed within the said county, in the name and by the authority of the state of Kansas," etc., on the ground of its omitting to set forth that the grand jury were of the county of Doniphan, is not well taken. Such an omission is not one of the causes specified in § 260, criminal code (1859), for the arrest of judgment, and not available in a motion under that section. (*Guy v. State*, 1 K. 446.) And a judgment cannot be arrested upon the ground that the evidence offered does not support the charge made against the defendant; (*State v. McCool*, 34 K. 617;) and an indictment stating offense, and court having jurisdiction, judgment cannot be arrested. (*Wassels v. Territory*, McC. 100.) If a motion in arrest of judgment is made, because information does not state facts, etc., new trial granted and *nolle* entered, plea of former jeopardy cannot be entered to new information. (*State v. Hart*, 33 K. 218.) A motion in arrest of judgment properly overruled, indictment for murder in first degree, containing sufficient allegation of the *intent*, etc. (*Smith v. State*, 1 K. 365.)

ARREST.

19. A private person may, in a temperate manner and without a warrant, arrest one who has just committed a felony; and where a person has been apprehended in the commission of a felony, or in fresh pursuit, notice of the crime and the purpose of pursuit is not necessary. (*State v. Mowry*, 37 K. 369.)

BILL OF EXCEPTIONS.

20. A general exception to the whole of the instructions is not sufficient. (*State v. Wilgus*, 32 K. 126.) Pleadings, orders and judgments should not be entered in a bill of exceptions. (*State v. Nickerson*, 30 K. 547.) Where it is alleged that the trial court erred in its rulings, it is the duty of the party complaining to indicate wherein the error consists as well as the particular ruling of which he complains; (*State v. Jennerson*, 14 K. 133;) and the only way to make the testimony or statements a part of the record is to embody such testimony or statements in a bill of exceptions allowed and signed by the judge of the trial court. (*State v. McClintock*, 37 K. 40.) So where the record does not show that the bill of exceptions contains all the evidence, this court cannot say, in the absence of any showing, that there was not evidence produced to the court that declarations made by the accused while in custody were voluntarily made. (*State v. Folwell*, 14 K. 105.)

21. Instructions asked for by the defendant and refused by the trial court cannot become a part of the record, unless they are embodied in a bill of exceptions; (*State v. McClintock*, 37 K. 40;) and all matters not required by statute to be of record, to be available in this court must be embodied in a bill of exceptions, signed, sealed, and ordered to be made a part of the record. (*State v. Carr*, 37 K. 421.) Neither the certificate of the clerk of a district court, nor the agreed statement of counsel, as to what occurred at a trial, can be made to supply the place of a bill of exceptions; it will be disregarded by the supreme court. (*State v. Bohan*, 19 K. 28.) A bill of exceptions properly allowed, signed and filed and ordered to be made a part of the record, is not void because the clerk fails to make a journal entry thereof; (*State v. Fry*, 40 K. 311;) but a bill of exceptions which is not presented, allowed, signed and filed until after the final adjournment of the term of the court at which the trial was had, cannot be regarded. (*State v. Smith*, 38 K. 194.) An objection to the decision of a judge at chambers should be

reduced to writing and presented to the judge for his allowance, at the conclusion of the hearing when the decision is made, unless application is made for additional time, which may be given, but never to exceed ten days; (*State v. Burrows*, 33 K. 10;) and where a case was tried at the February term, and the regular term next after that of the trial commenced on the 29th of May following, and a bill of exceptions of the proceedings of the trial was not presented or allowed, or signed, or filed, until June 5th, and during the said May term, such bill is unauthorized by law, and no part of the record. (*State v. Bohan*, 19 K. 28.) A bill of exceptions, though allowed and signed during the term, not filed until many months thereafter and until two regular terms had intervened, never became a part of the record. (*Brown v. Rhodes*, 1 K. 364; *State v. Bohan*, 19 K. 28; *State v. Schoenewald*, 26 K. 288.)

BOND.

22. A bond to keep the peace cannot be required unless acts or threats in presence of the justice, or complaint is in writing. (*State v. Coughlin*, 19 K. 537.) Where the court requires security to be of good behavior for a time not exceeding two years, or to stand committed until such security is given; and subsequently such person, not voluntarily, but to prevent himself from being imprisoned, executes with sureties a bond containing the condition prescribed by the court, but having super-added therein material and important words of condition beyond what were required by the court, or authorized by the statute: *Held*, That the bond is invalid. (*Durein v. State*, 38 K. 485.) But the court before which any person is convicted of a criminal offense has the power, in addition to the sentence prescribed or authorized by law, to require such person to give security to be of good behavior for a term not exceeding two years, or to stand committed until such security is given. (*State v. Chandler*, 31 K. 202.)

CODE.

23. Technical requirements are abolished by the criminal code; (*State v. Harp*, 31 K. 496;) and it has changed the common-law rules of pleading; (*State v. White*, 14 K. 538;) and it governs the rules of pleading. (*Wessels v. Territory*, McC. 100; *Madden v. State*, 1 K. 340; *State v. Harp*, 31 K. 496.) The spirit of the code is to disregard technicalities; (*Territory v. Reyburn*, McC. 134;) and it gives to the language of the indictment its ordinary meaning. (*Smith v. State*, 1 K. 365.)

COMPLAINT.

24. In a city of the second class, the law of 1867 did not change the common law requiring the complaint to be in writing and under oath. (*Prell v. McDonald*, 7 K. 427.) Under the prohibitory liquor law, the assistant attorney general for the county may sign, verify and file all such complaints, informations, petitions and papers as the county attorney is authorized to sign, verify, or file. (*In re Gilson*, 34 K. 641.) Where a person is prosecuted before the police judge of the city for a violation of such ordinance, the complaint is not void for the reason that the letters "J. P." instead of the letters "P. J." or the words "Police Judge," are attached to the jurat. (*City of Cherokee v. Fox*, 34 K. 16.) In a complaint for an assault to commit rape, sex omitted from complaint, it is immaterial, as it can be ascertained from *name* and pronoun *her*. (*Tillson v. State*, 29 K. 452.) If the complaint does not charge an offense, the prosecutor cannot be held liable for the costs; (*In re Stoneberger*, 31 K. 638;) but a complaint for violating a city ordinance need not set it out in full. (*City of Emporia v. Volmer*, 12 K. 622.) Where a complaint under the dramshop act does not in terms charge a sale without a license, but charges generally an unlawful selling, and the defendant, pleading not guilty, is convicted, the complaint is not an absolute nullity; (*Prohibition*

Amendment Cases, 24 K. 701;) and in a complaint before a justice of the peace for an offense created by statute, it is sufficient, as a general rule, to describe the offense in the words of the statute. To this rule there are some exceptions, but this is not one of the excepted cases. (*State v. Armell*, 8 K. 288.)

25. Where the complaint is on "information and belief" *habeas corpus* was refused. (*In re Lewis*, 31 K. 71.) Where the complaint is amended, it is not error, (*State v. Hinkle*, 27 K. 308,) and it was not necessary to refile or reverify the amended complaint simply because portions thereof were stricken out and count four was numbered one. (*State v. Redford*, 32 K. 198.) A complaint was filed, charging a misdemeanor in cutting and carrying away timber, and was complete in every respect, except that it failed to describe the particular tract of land on which the timber stood, or to give the name of the owner of the land, or of the timber. A warrant was issued, which described the offense in the language of the complaint. As the defect in the complaint and warrant, if it be a defect, was one curable by amendment, and as there was enough stated to challenge judicial examination and consideration, the proceedings cannot be adjudged void, and an action of false imprisonment will not lie against the prosecuting witness. (*Wagstaff v. Schippel*, 27 K. 450.) A party may be held on a charge differing from warrant or complaint, but a new complaint ought to be filed; (*Redmond v. State*, 12 K. 172;) but the preliminary examination is had on the warrant of arrest, and not on the complaint. (*Redmond v. State*, 12 K. 172.)

CONTINUANCE.

26. Where an affidavit for a continuance on the ground of absent witnesses is filed by the defendant in a criminal case, and the prosecutor for the state consents that the same shall be read in evidence as the statement and testimony of such absent witnesses, it is proper for the district court, or for the criminal

court, as in this case, under the provisions of rule 14 of the supreme court, to refuse the application and direct the trial to proceed. (*Thompson v. State*, 5 K. 159; *State v. Dickson*, 6 K. 209.) An affidavit purporting to state what the evidence of four absent witnesses would be, if present, was read on the trial by the defendant in a criminal prosecution, upon an agreement of the county attorney that such affidavit might be read to the jury *as the deposition* of such witnesses. Afterward the court refused (though requested to do so by the defendant,) to instruct the jury to treat said alleged evidence as though said witnesses had been personally present at the trial, and had testified to such evidence on the witness stand. *Held*, Not error. (*State v. White*, 17 K. 488.)

27. In a criminal prosecution, where the defendant has made a motion for a continuance on account of the absence of testimony, and filed an affidavit stating what the absent testimony is, and the county attorney agrees that the testimony of the witnesses may be introduced in evidence on the trial; and the trial is then commenced, and the defendant has these absent witnesses subpoenaed, and claims that they will be present at some time during the day of the trial, but they do not appear during the trial, and the court compels the defendant to close his evidence without the oral testimony of these absent witnesses; and it further appears that this testimony is incompetent in the case: *Held*, That the court did not commit any error in compelling the defendant to close his evidence without the oral testimony of said witnesses. (*State v. Plowman*, 28 K. 569.) Where, in the trial of a defendant, charged with the commission of a felony, an affidavit for a continuance is filed by such defendant on account of an absent witness, and the prosecution consents that on the trial the facts alleged in the affidavit shall be read and treated as a deposition of the absent witness, such affidavit cannot afterward be impeached for want of diligence on the part of the defendant in procuring the attendance of such witness, or in taking his deposition as prescribed by law; nor by showing that the defendant had good reason to believe, if the witness was present and gave such tes-

timony, it would be untrue; nor by proving the non-existence of the witness therein named. And *further held*, that such affidavit should be read and treated in all respects as the deposition of the absent witness. (*State v. Roark*, 23 K. 147.) When an affidavit for a continuance, on the ground of an absent witness, who is beyond the limits of the state, is filed by the defendant in a criminal case, and the state consents that the same shall be read in evidence as the statement and testimony of such absent witness, it is proper to refuse the application. (*State v. Dickson*, 6 K. 209.)

28. When defendant, at the term at which the information is filed, shows by his affidavit that there is material testimony which he has been unable to procure, and that he has used reasonable diligence since his arrest to ascertain and procure such testimony, considering the circumstances in which he has been placed and the means at his disposal, and that there is a probability of obtaining such testimony if a continuance be granted, it is error to refuse such continuance. (*State v. Hagan*, 22 K. 490.) Where the affidavit for continuance contains mere general allegations of diligence, is indefinite as to the present location of the witnesses, and does not clearly show any connection between the testimony of such witnesses and the crime, it is not error to overrule the application. (*McLean v. State*, 28 K. 372.) A continuance refused, party not showing due diligence, held not error. (*State v. Rhea*, 25 K. 576.) Where a defendant has exercised only slight diligence, and where numerous other witnesses could easily be obtained to prove the defendant's conduct for many years, the trial court did not err in overruling an application for a continuance on account of the absence of such witness. (*State v. Gould*, 40 K. 259.)

COSTS.

29. A judgment of conviction in a criminal case in the district court carries costs against the defendant; (*Commissioners v. Whiting*, 4 K. 273; *State v. Granville*, 26 K. 158;) and when

any person has been convicted of crime, he is liable for all costs made, both in the prosecution and defense of the case. (*Comm'rs of Shawnee Co. v. Whiting*, 4 K. 273.) But when the prosecution is for a felony and the conviction only of a misdemeanor included therein, only such costs are taxable as would have been taxable had the prosecution been for the misdemeanor. (*State v. O'Kane*, 23 K. 244; *State v. Granville*, 26 K. 158.) If the defendant be bound over on a preliminary examination before a justice of the peace in answer to a charge of felony, and thereafter on trial in the district court is found guilty of only a misdemeanor, which might have been tried before a justice, the costs of the preliminary examination are properly taxable against the defendant. (*State v. Granville*, 26 K. 158.) A single information having been filed against four defendants, they demanded separate trials. After a jury had returned a verdict of guilty against one, the others entered a plea of guilty. The pleas entered in this case were in effect a waiver of the demand for separate trials, and a single trial fee was all that was taxable to the county attorney. (*State v. Granville*, 26 K. 159.) And where a joint prosecution against four defendants was commenced, a separate trial was demanded, and one of the defendants tried by a jury, and after a verdict of guilty was returned the other defendants pleaded guilty, and some of the witnesses subpoenaed and attending were not sworn, such witness fees were properly taxable against the defendants. (*State v. Granville*, 26 K. 158.) Where a county attorney files a complaint under the prohibitory law, and verifies the same upon information and belief, and to obtain a warrant for the arrest of the defendant has another person verify the complaint to be true, of his own knowledge, and there is a failure to convict in the case, the costs of the prosecution are to be paid by the county in which the prosecution was begun. (*State v. Manlove*, 33 K. 483.)

30. Costs in a criminal case, not paid by defendant or prosecutor, must be paid by county; (*Comm'rs of Labette Co. v. Keirse*y, 28 K. 40;) but neither the county nor prosecuting witness was liable for costs, on a *nolle prosequi* being entered;

(*State v. Campbell*, 19 K. 481;) but *nolle prosequi* entered, and no judgment for costs, county liable for fees of district clerk. (*Bedilion v. Comm'rs of Cowley Co.*, 27 K. 592.) The clerk's and sheriff's fees must be paid by county on conviction, if costs cannot be made out of defendant, in vacation after sentence; (*Comm'rs of Shawnee Co. v. Whiting*, 4 K. 273;) and fees of jurors and bailiff must be borne by county where crime was committed. (*Comm'rs of Shawnee Co. v. Comm'rs of Wabaunsee Co.*, 4 K. 312.) In proceedings in *habeas corpus*, a county is liable for fees; held to be a criminal case within the scope of Laws 1881, ch. 108, § 1; (*Gleason v. Comm'rs of McPherson Co.*, 30 K. 53;) but a county is not liable for the costs of the sheriff for serving papers in a bastardy case. (*Gleason v. Comm'rs of McPherson Co.*, 30 K. 492.) It was held in 1868 that the county was not liable for witness fees of defendant, on conviction. (*Comm'rs of Shawnee Co. v. Hanback*, 4 K. 282.)

31. Costs in preliminary examination on discharge, for offense less than felony, should not be taxed against county. (*Shields v. Comm'rs of Shawnee Co.*, 5 K. 589.) A county is not liable to sheriff for mileage and transportation of its prisoners sent to adjoining county for misdemeanor, it having no jail. (*Comm'rs of Osborne Co. v. Honn*, 23 K. 256.) A county is not liable for witness fees where there is no conviction, (*Comm'rs of Shawnee Co. v. Ballinger*, 20 K. 590; *Comm'rs of Pawnee Co. v. Miller*, 20 K. 595,) and a county is not liable for justice or witness fees, under Gen. Stat., ch. 83, where justice has jurisdiction. (*Johnson Co. v. Wilson*, 19 K. 485.) The prosecuting witness, in an action to prevent an offense, is never liable for costs; (*State v. Menhart*, 9 K. 98;) and the district court has no power, under § 16, ch. 82, C. L. 1879; to adjudge costs against complaining witness. (*State v. Dean*, 24 K. 53.)

32. When a witness prosecutes without cause, and fails to pay the costs, imprisonment held to be constitutional; (*In re Ebenhack*, 17 K. 618;) and costs taxed against prosecuting witness in these cases. (*State v. Reisner*, 20 K. 548; *State v. McGilvray*, 21 K. 680.) The prosecuting witness is liable for costs

in a prosecution for an offense less than a felony, on failure to bind over for want of evidence. (*Shields v. Comm'rs of Shawnee Co.*, 5 K. 589.) Where a prosecution is without probable cause, prosecutor is liable for costs; (*Connelly v. Woods*, 31 K. 359;) but if complaint does not charge an offense, prosecutor cannot be held liable for the costs. (*In re Stoneberger*, 31 K. 638.) Where the jury return a verdict of not guilty, and state therein the name of the prosecutor and find that the prosecution was instituted by him without probable cause and from malicious motives, the trial court has no power to set aside so much of the verdict as embraces these findings and adjudge the costs against the county. (*State v. Zimmerman*, 31 K. 85.)

33. The supreme court cannot render a judgment against prosecuting witness when he is not a party to suit in said court. (*State v. Cummerford*, 16 K. 507.) In a prosecution for assault and battery, the defendant was, in a justice's court, convicted and sentenced to pay a fine and the costs, but on appeal, defendant was acquitted. The court then assessed the costs of the case against the prosecuting witness, on the ground "that the defendant had been tried, acquitted and discharged." This was error. (*State v. Reisner*, 20 K. 548.) Where a defendant is prosecuted in separate counts, and is found guilty under some of the counts and not guilty under the others, he should not be required to pay costs accruing under the counts under which he is acquitted. (*State v. Brooks*, 33 K. 708.) No more than \$10 costs, in criminal cases, exclusive of witnesses', county attorney's and jury fees, shall be charged in any case. (*Keirsev v. Comm'rs of Labette Co.*, 30 K. 577.) A physician is not liable to probate judge for fees for certifying to druggists that affidavit has been filed, under the prohibitory law. (*Miller v. Minney*, 31 K. 522.) The expenses of agent after fugitive from justice are to be paid by county; (*Moon v. Comm'rs of Butler Co.*, 30 K. 458;) but a county is not bound to furnish medical attendance for prisoners sent from adjoining county; (*Comm'rs of Smith Co. v. Comm'rs of Osborns Co.*, 29 K. 72;) for the statutes seem to contemplate that sheriff should furnish medical

attendance for prisoners sent from another county. (*Comm'rs of Smith Co. v. Comm'rs of Osborne Co.*, 29 K. 74.) A state witness moving out of the state, but under recognizance, may receive mileage from the state line. (*Comm'rs of Lyon Co. v. Chase*, 24 K. 774.) A mandamus will not be granted to obtain issue of county orders, on claims of county attorney not audited. (*State v. Bonebrake*, 4 K. 247.)

COURT.

34. The February term of district court adjourned to 24th May, and court did not convene then; the court is legally open until it adjourns *sine die*. (*State v. Bohan*, 19 K. 28.) A trial for a contempt is a summary proceeding, and a judge may try contempt at chambers without a jury. (*State v. Cutter*, 13 K. 131.)

DEGREE.

35. In a prosecution for an offense which includes others of a less degree, and there is even slight testimony which tends to show that the offense committed was lower in degree than the one specifically charged, it is the duty of the court to define such lower degree, and instruct the jury upon the law applicable thereto. (*State v. Evans*, 36 K. 497.) Upon an information or an indictment for an offense consisting of different degrees, the jury can only find the defendant guilty of a degree inferior to the one charged, when the facts constituting the offense stated include the lesser offense; and where a defendant is charged in an information with the commission of the crime of burglary in the second degree, and in the night time, under § 63 of the act relating to crimes and punishments, a verdict that the defendant is guilty of burglary in the third degree is error. (*State v. Behee*, 17 K. 402.) The defendant was charged with the offense of robbery in the first degree. The jury found the defendant guilty as charged. There was not sufficient evidence

to sustain a verdict. The offense of robbery in the first degree does not necessarily include grand larceny, and said verdict does not necessarily establish the fact that the defendant was guilty of grand larceny. (*State v. Howard*, 19 K. 507.) Where the facts stated in the information constitute only the crime of burglary in the second degree, and the defendant could not be convicted of any other degree of burglary under it, a verdict finding the defendant guilty as charged is sufficient, and judgment can legally be pronounced upon it. (*State v. Adams*, 20 K. 312.) Under a charge of murder in the first degree, the defendant may be convicted of any offense necessarily included therein, viz., murder in the second, and manslaughter in the different degrees, and it is the duty of the court to explain all to the jury. (*Craft v. State*, 3 K. 451.) A charge of murder in an indictment necessarily includes the crime of manslaughter in the third degree. (*Roy v. State*, 2 K. 405.)

36. A defendant may be charged with committing murder in the first degree, and be convicted, on such charge, of committing an assault and battery only, provided the assault and battery are necessarily included in such charge. (*State v. O'Kane*, 23 K. 244.) Where the defendant was charged with assault and battery and convicted of assault, and it appears that if he was not guilty of assault and battery he was not guilty of any offense, an instruction by the court upon the lower degree of the offense is inapplicable; (*State v. Mize*, 36 K. 187;) and under a charge of assault and battery with intent to kill, a defendant may be convicted of a simple assault and battery; and where the information charges such assault and battery with a revolver, and the evidence is not preserved in the record, no special instructions having been asked, it cannot be adjudged that there was error because the court did not specifically instruct that the defendant could not be convicted of an assault and battery in any other manner. (*State v. Cooper*, 31 K. 505.) An assault is an offense of an inferior degree to an assault with intent to kill; and under an indictment for assault with intent to kill, there was a conviction of assault in minor degree;

though not indictable for that, court had jurisdiction. (*Guy v. State*, 1 K. 448.) Where an information charges that the defendants did assault, beat and wound with a deadly weapon, with intent to kill, it is not error for the court to charge the jury that such information and charge includes the less offense of assault and battery. (*State v. Schreiber*, 41 K.

37. Generally, wherever a person is charged upon information with the commission of an offense under one section of the statutes, and the offense as thus charged includes another offense under another section of the statutes, the defendant may be found guilty of either offense. (*State v. Burnell*, 34 K. 312.) The offense prescribed by § 15 of the act regulating crimes and punishments, includes the offense prescribed by § 44 of such act. Upon a charge of committing the first of the above-mentioned offenses, the defendant may be found guilty of committing the second. (*State v. Watson*, 30 K. 281.)

DOUBT.

38. An instruction which implies that the defendant is to have the benefit of *every* doubt is properly refused. The accused can only claim the benefit of reasonable doubt. (*State v. Cassidy*, 12 K. 550.) The court, in attempting to define reasonable doubt, said: "That to exclude such doubt, the evidence must be such as to produce in the minds of prudent men such certainty that they would act on the conviction without hesitation, in their own most important affairs." Such definition did not prejudice the defendant. (*State v. Kearley*, 26 K. 77.) The court, in defining the phrase "reasonable doubt," instructed the jury as follows: "The words 'reasonable doubt' mean what they imply; that is, that the doubt must be a reasonable one, such a doubt as might exist in the mind of a man of ordinary prudence when he was called upon to determine which of two courses he would pursue in a matter of grave importance to himself, when two courses are open to him, and the taking of one would lead to a

different result from the taking of the other, and it would be impossible for him to determine as to which of the two results would be most advantageous to him." *Held*, The explanation not sufficiently clear or intelligible to direct or benefit the jury. (*State v. Bridges*, 29 K. 138.) A reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is, to a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it. (*State v. Bridges*, 29 K. 138.) The court refused to charge "that the defendant is entitled to the benefit of every reasonable doubt upon every material fact involved in the case," but charged that "the defendant is entitled to the benefit of every reasonable doubt of his guilt, remaining in the minds of the jury, after canvassing the whole of the testimony in the case." The charge given was the law applicable. (*Wise v. State*, 2 K. 419.) Where the court expressly charged the jury that they must be "satisfied of his (defendant's) guilt beyond a reasonable doubt," the jury could not have been misled or the defendant prejudiced by a statement elsewhere in the charge that the presumption of innocence "will protect the defendant unless the state has overcome it by such proof as satisfies the jury of his guilt." (*State v. Adams*, 20 K. 312.)

ELECTION.

39. The county attorney, when called on to elect upon which particular sale he would rely for a conviction, elected to stand upon the sale made to the witness, but he did not designate the time of such sale, the kind of liquor sold, nor did he indicate in any other way the particular sale relied upon. The election was not sufficiently definite. (*State v. O'Connell*, 31 K. 383; *State v. Guettler*, 34 K. 582.) Where an indictment or infor-

mation charges in separate counts separate public offenses, and they are all misdemeanors of a kindred character and against the same person, the defendant cannot, as a matter of right, require the state, before the trial, to elect upon what count or specific offense it will rely for conviction. (*State v. Skinner*, 34 K. 256.) The court may exercise some discretion in requiring elections to be made, when offenses joined. (*State v. Crimmins*, 31 K. 376.) The evidence of several sales may be allowed, but the prosecutor will be compelled to elect on which transaction he will rely. (*State v. Schweiter*, 27 K. 499.) A failure to make a definite election as to what offense the prosecutor will rely on will be ground for a new trial; (*State v. O'Connell*, 31 K. 383;) and a failure to elect on what offense state would rely, in liquor case, is error. (*State v. Olferman*, 29 K. 502. Where the county attorney is required to elect upon what particular sale of intoxicating liquors he will rely for a conviction, it is enough if, with reasonable certainty, he points out the particular sale upon which a conviction will be asked. (*State v. Guettler*, 34 K. 582.) An election by prosecution of an offense that is indefinite as to date is not ground for a new trial. (*State v. Crimmins*, 31 K. 376.)

EVIDENCE.

40. *Accomplice*.—Statements of an accomplice, made after the crime, are admissible in disclosing where and upon whom the crime was committed; (*State v. Cole*, 22 K. 474;) and an accomplice testifying is not entitled to his discharge; (*Cummings v. State*, 4 K. 225;) and an instruction omitting "should be corroborated as to a material fact," applied to an accomplice, is not error. (*State v. Adams*, 20 K. 312.) Under a charge of larceny against four, trial of one, evidence tending to show joint concealment of stolen property, competent. (*Lewis v. State*, 4 K. 296.) The record of conviction of principal *prima facie* proof, but not conclusive of that fact, as against accessory

before the fact. (*State v. Mosley*, 31 K. 355.) The state may be permitted to recall accused after he has left the stand, to lay a foundation for contradiction. (*State v. Horne*, 9 K. 119.)

41. *Accused.*—The jury may be told that they may consider the failure of the accused to furnish evidence that might explain suspicious facts. (*State v. Grebe*, 17 K. 458.) An affidavit for a continuance, admitted in evidence, must be treated as a deposition. (*State v. Roark*, 23 K. 147.) Under a charge of assault with intent to kill, following a quarrel over land title, it is immaterial which has the best title. (*State v. Benson*, 22 K. 471.) Any communication which an attorney is precluded by statute from disclosing, his client cannot be compelled to disclose against his objection of privilege. (*State v. White*, 19 K. 445.) The accused may stand upon the presumption of innocence until every material allegation and every ingredient of the crime are proved. (*Horne v. State*, 1 K. 42.)

42. *Burden of proof.*—No material averment in an indictment which is denied by the defendant is taken as true, but it must be proved in some manner by the prosecution; and when it is averred in an indictment that the defendant kept a ferry without a license, it is incumbent on the territory to prove that defendant had no license. (*Territory v. Reyburn*, McC. 134.) The prosecution must prove every material allegation, and every ingredient of the crime. (*Horne v. State*, 1 K. 42.) No material averment in an information which is denied by the defendant is taken as true, but it must be proved in some manner by the prosecution. (*State v. Schweiter*, 27 K. 501.) The state alleges that the accused was personally present at the commission of the crime, and such personal presence is necessary to a conviction; that fact must be established by the state by evidence that will convince the jury beyond a reasonable doubt. (*State v. Child*, 40 K. 482.) The burden of proof, in prosecution under the dramshop act, is on the plaintiff, to prove no license; (*State v. Kuhuke*, 26 K. 405;) but the presumption of innocence does not overthrow a presumption from unexplained facts. (*State v. Ingram*, 16 K. 14.) •

43. *Circumstantial*.—It is no defense to show assistance of a detective in committing a crime. (*State v. Jansen*, 22 K. 498.) Evidence of notice of contract was rejected, there being no evidence of a contract. (*State v. Gurnee*, 14 K. 111.) It is the province of the jury to weigh conflicting evidence. (*State v. Potter*, 16 K. 82.) In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the prisoner committed the crime, but they must all be inconsistent with any other rational conclusion. (*Horne v. State*, 1 K. 42.)

44. *Confessions*.—The admissions of accused, made while in custody, are admissible where they were voluntary; (*State v. Folwell*, 14 K. 105;) and the statements made by prisoner without duress may be given in evidence against him. (*State v. Reddick*, 7 K. 143.) A person charged with the crime of offering money to the prosecuting witness in a state case to absent himself and not testify against the accused testified on the trial of that case that he had offered the witness money, but coupled with this, statements explanatory of his motive and intent in making the offer. This statement was not a confession within the well-defined legal meaning of that word, implying an acknowledgment of guilt. (*State v. Crowder*, 41 K. 101.) A voluntary confession, made to constable in charge, by accused, is admissible in evidence. (*State v. White*, 17 K. 487.) Where the prosecution introduces evidence showing a portion of a certain conversation had between the defendant and a third person, the defendant may introduce evidence showing the rest of such conversation; (*State v. Brown*, 21 K. 38;) but where a defendant charged with burglary makes a statement to the officer having him in charge, under a promise that he shall not be prosecuted, indicating where the stolen property may be found, and the property is afterwards found in accordance with his statements, and it is shown conclusively by other evidence that the burglary and larceny were committed by some one, the statement may be shown to the jury as an admission of a fact tending to show that the defendant had some connection with the commission of the burglary. (*State v. Mortimer*, 20 K. 93.)

45. It is not error to admit confessions of the defendant, although made while in custody, and at the time a crowd of persons was surrounding the building in which he was confined, provided it appears that such confessions and admissions were made without, and were uninfluenced by, any threats, promises, or other inducements. (*State v. Ingram*, 16 K. 14.) Ordinarily a conspiracy should be established *prima facie* before the acts and declarations of one co-conspirator can be given in evidence against another; (*State v. Miller*, 35 K. 328;) and generally, where there is evidence of a conspiracy to commit a crime, and of its subsequent commission, the state may, and in support and corroboration thereof, show any act or conduct of the alleged conspirators intermediate the conspiracy and the crime, which apparently recognizes the existence of the conspiracy, reasonably indicates preparation to commit the crime, or preserve its fruits. (*State v. Adams*, 20 K. 311.) The acts and declarations of one co-conspirator in furtherance of the principal object and design of the conspiracy, may be shown in evidence against each of the conspirators; but ordinarily when the acts and declarations of one co-conspirator are offered in evidence as against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause; but this cannot be always required. (*State v. Winner*, 17 K. 298.) Declarations of an alleged co-conspirator are incompetent to prove conspiracy. (*Chapman v. Blakeman*, 31 K. 684.) To make the declarations of one conspirator evidence against the others they must be made in furtherance of the common criminal design. When the conspiracy has ended, or the crime involving conspiracy has been consummated, the admission of one, in the absence of the other conspirators, that he and others participated in the crime is a mere narrative of a past occurrence, and can affect only the one who makes it. (*State v. Johnson*, 40 K. 266.)

46. *Continuance*.—A continuance may be refused defendant, on admitting affidavit to be read in evidence; (*State v. Dickson*, 6 K. 209;) and a continuance refused is not error, the affidavit

being admitted, and the evidence expected from the absent witnesses incompetent. (*State v. Plowman*, 28 K. 569.) If an affidavit is read as a deposition by agreement, it is not error to refuse to instruct that the jury should treat this as though the witnesses had been present and testified at the trial. (*State v. White*, 17 K. 488.) The defendant has the right to process to compel his witnesses to attend in his behalf; and a defendant cannot be forced to trial, when material witnesses are duly subpoenaed in his behalf, and are within the jurisdiction of the court and fail to appear. (*State v. Roark*, 23 K. 147.)

47. *Dying declarations.*—The declarations made to wife the day before the killing are incompetent, she being tried separately for the same offense. (*State v. Hendricks*, 32 K. 559.) Dying declarations must be made under a sense of impending death; (*State v. Wilson*, 24 K. 189;) and are only admissible where the death of the person who made the declaration is the subject of the charge. (*State v. Bohan*, 15 K. 407.) Statements not under oath can only be admitted in evidence as dying declarations when they are made *in extremis*. (*State v. Medlicott*, 9 K. 257.) The admission of evidence of deceased prosecuting witness, given at the preliminary examination, does not exclude dying declarations also. (*State v. Wilson*, 24 K. 189.)

48. *Expert.*—Sec. 216 of the code of criminal procedure applies only to persons of skill or experts, and the rule of three witnesses therein named obtains only when the testimony is purely expert testimony. (*State v. Foster*, 30 K. 365.) An opinion as to insanity was allowed, although witness had not shown that he made diseases of the mind a study. (*State v. Reddick*, 7 K. 143.) A person who is a chemist and toxicologist may testify as an expert concerning the effect of a certain poison upon the human system, although he may not be a physician or surgeon, (*State v. Cook*, 17 K. 392.) The opinion of a witness, not expert, was admitted to prove tracks were made by wagon of accused. (*State v. Folwell*, 14 K. 105.) A witness cannot be permitted to testify as an expert, as to his opinion founded on certain facts and upon a part of the medical testimony in the

case, it not appearing what part of the testimony he has heard. (*State v. Medlicott*, 9 K. 257.) It is not necessary that the stomach of party murdered by poison be kept under lock and key. (*State v. Cook*, 17 K. 392.)

49. *False witness*.—Court deciding one witness had sworn false, and impeaching witness the truth, material error, jury finding defendant guilty. (*State v. Hughes*, 33 K. 22.) An instruction *falsus in uno, falsus in omnibus*, asked as to one witness, may be made to apply to all. (*State v. Kellerman*, 14 K. 135.) A refusal to give, "if the jury believe from all the evidence that the witness, M. B., has testified falsely in respect to any material fact, it is their duty to disregard the whole of his testimony," error. (*Campbell v. State*, 3 K. 488.) The question whether a jury should disregard all the evidence of a corrupt witness should be left to them, but error is waived by not excepting. (*State v. Potter*, 16 K. 82.)

50. *False pretenses*.—In a prosecution for false pretenses, prosecutor may testify he believed the pretenses. (*In re Snyder*, 17 K. 542.) In a prosecution for obtaining money under false pretenses, it is necessary for the state to negative specifically the false pretenses relied on to sustain the charge; and to sustain the charge of obtaining money under false pretenses, it is essential to show not only that false pretenses were made, but also that the person who parted with the money relied upon the false pretenses made, and that the money was obtained by reason thereof. (*State v. Metsch*, 37 K. 222.)

51. *Husband and wife*.—Under the law of 1871, a wife may be permitted to testify for the state; (*State v. McCord*, 8 K. 232;) and a letter written by defendant to his wife may be offered in evidence by the state. (*State v. Buffington*, 20 K. 599.)

52. *Impeaching*.—As the proper basis for the impeachment of a witness was not laid, the court committed no error in refusing to listen to counsel's statement as to what evidence he proposed to offer, when the character of the questions asked showed the evidence inadmissible. (*State v. Small*, 26 K. 209.) The impeaching of a witness without foundation allowed, but

afterwards taken from the jury, is not material error. (*State v. Fooks*, 29 K. 425.) The error in impeaching a witness without first laying a foundation is not material in this case. (*State v. Martin*, 31 K. 354.) The presumption that a witness will declare the truth, ceases as soon as it manifestly appears that he is capable of perjury; (*Campbell v. State*, 3 K. 488;) and the silence of a witness is sometimes an impeaching fact, as well as his contradictory statements, and when it is, it may be proved by himself or others. (*State v. McKinney*, 31 K. 571.) The credit of a witness may be impeached by showing that the statements made in his presence by another, and which were assented to and adopted by him as his own, are contrary to what he has testified at the trial; (*State v. McGaffin*, 36 K. 315;) and when a witness testifies that the prosecuting witness had a private disease at a certain time, the accused may cross examine to show that said disease was contracted prior to said time. (*State v. Otey*, 7 K. 69.)

53. The admission of ill-will towards party by witness will not preclude cross-examination as to extent. (*State v. Collins*, 33 K. 77.) The state may recall the accused after he has left the stand, to lay a foundation for contradiction; (*State v. Horne*, 9 K. 119;) and a witness stating he told persons of certain facts may be impeached by proving he did not. (*State v. McKinney*, 31 K. 571.) Where the witness for accused testifies that he did not escape when he could, he may be shown to have told at other times that the reason was the accused was sick. (*Lewis v. State*, 4 K. 296.) The conversation of a prosecuting witness with third party cannot be proven, no grounds for impeachment having been laid; (*State v. Small*, 26 K. 209;) and a witness who is impeached may be sustained by evidence in rebuttal. (*State v. McKinney*, 31 K. 571.) Where the impeachment goes to contradict the witness by prior inconsistent declarations, and charges him with a recent fabrication of his testimony, it is proper to show that the same account was given by him to other persons anterior to the date of the alleged fabrication. (*State v. Petty*, 21 K. 55.) The testimony given by the defend-

ant on his preliminary examination, and which is reduced to writing and signed by him, may, when properly identified, be offered in evidence by the state against him. (*State v. Miller*, 35 K. 328.) Before a witness can be impeached by proof of contradictory statements made in his evidence on a former trial, such contradictions must be called to his attention. (*State v. Cleary*, 40 K. 288.)

54. *Judicial notice*.—The court cannot take judicial notice whether a town or city is incorporated or not; (*State v. Pitman*, 10 K. 598;) and for the violation of a city ordinance, on appeal to the district court, the district court should take judicial notice of the incorporation of such city and of the existence and substance of its ordinances. (*Solomon City v. Hughes*, 24 K. 211.) An ordinance will be held valid, though the records may not show that the yeas and nays were taken on the final passage of the ordinance as a whole. (*Solomon City v. Hughes*, 24 K. 211.) Judicial notice will be taken of all prior proceedings in an action. (*State v. Bowen*, 16 K. 475.)

55. *Larceny*.—The possession of stolen property, recently after it is stolen, is *prima facie* evidence of guilt, and throws upon the possessor the burden of explaining such possession, and, if unexplained, may be sufficient of itself to warrant a conviction; yet before it can be deemed sufficient, standing by itself, to warrant a conviction, it must be so recent after the time of the larceny as to render it morally certain that the possession cannot have changed hands since the larceny. (*State v. Cassidy*, 12 K. 550.) The possession of property in this state, stolen in another—evidence of theft in another state competent. (*McFarland v. State*, 4 K. 68.) In larceny, the proof of joint possession of fruit of crime is some evidence of offense; (*Lewis v. State*, 4 K. 296;) and evidence of change of financial condition of accused is competent, in charge of larceny. (*State v. Grebe*, 17 K. 458.) The jury have a right to believe part of statements of accused, and reject the balance, in explanation of possession of stolen property; and the possession of a horse, not identified as the one stolen, is competent evidence in a larceny case. (*State v. Ingram*, 16 K. 14.)

56. *Liquor*.—In a murder case, the state may show deceased was intoxicated at the time of the homicide; (*State v. Horne*, 9 K. 119;) and the intoxication of the accused may be considered on question of intent to take life. (*State v. White*, 14 K. 538.) Whether bitters, cordials, tonics, etc., are intoxicating, is a question for the jury. (*Intoxicating Liquor Cases*, 25 K. 751.) In a liquor case, the evidence of the county attorney as to the contents of the journal of the probate judge, he being absent, is error. (*State v. Cook*, 30 K. 82.) Where the probate judge testifies as a witness that he has the possession of all the records of the probate judge's office, and has at that time the record of permits, and that such record shows that no permit has ever been granted to the defendant, and he also testifies that he has never issued any such permit, this proves *prima facie* that the defendant did not have any such permit; (*State v. Schmidt*, 34 K. 400;) and the probate judge proving from book that no permit was issued to sell liquor, must state that book contains all the permits, and state must prove no permit exists. (*State v. Nye*, 32 K. 201.) A prosecution for selling liquor without permit; proof that party was clerk of his wife, who had druggist's license; defendant not liable; (*State v. Hunt*, 29 K. 762;) but a permit to M. to sell liquor is no protection to S., he not being an employe of M., although both are prosecuted in same action. (*State v. Sterns*, 28 K. 154.) The dramshop act requires notice to be first given. (*State v. Gutekunst*, 24 K. 252.) A prosecution under dramshop act, defendant licensed, the burden of proof is on prosecution to show license invalid. (*State v. Kuhke*, 26 K. 405.) An offense (liquor law) not barred, though the proof is vague as to the year. (*State v. Crimmins*, 31 K. 376.) A sale implies a consideration. (*State v. Muntz*, 3 K. 384.)

57. Where one is charged with keeping nuisance (saloon), evidence of sales without license proves the offense. (*State v. Trissedre*, 30 K. 476.) Popular toilet medicines, given by standard authority, may be declared to be without the statute, although they might produce intoxication. (*Intoxicating Liquor*

Cases, 25 K. 751.) In the absence of evidence, beer is always presumed to be intoxicating; (*State v. Teissedre*, 30 K. 476; *State v. Jenkins*, 32 K. 477;) and judicial notice will be taken of intoxicating qualities of liquors; (*Intoxicating Liquor Cases*, 25 K. 751;) and the state may prove lager beer to be intoxicating, if denied. (*State v. Volmer*, 6 K. 371.) Fermented liquors are presumed to be intoxicating. (*State v. Volmer*, 6 K. 371.)

58. *Marriage*.—The deliberate admission of the defendant of a former marriage, coupled with cohabitation and repute, is evidence tending to prove an actual marriage, upon which a jury may convict. The declarations of the defendant, made in his own favor, respecting the first marriage, which formed no part of any statement or conversation called out by the state, and which were no part of the *res gestæ*, are inadmissible for the defense. (*State v. Hughes*, 35 K. 626.) The books of record of marriage license kept by the probate judges are evidence of all matters required to be contained therein. (*State v. White*, 19 K. 445.)

59. *Murder*.—In murder in the first degree, the *corpus delicti* may be proved by circumstantial evidence. (*State v. Winner*, 17 K. 298.) A threat to kill deceased, made by another in presence of accused, shortly before the murder, held to be part of the *res gestæ*; (*State v. Potter*, 16 K. 82;) and threats of accused, towards deceased, evidence. (*State v. Stackhouse*, 24 K. 445. Where evidence of communicated threats has been admitted, it is competent for the purpose of corroborating such evidence to introduce evidence of uncommunicated threats. (*State v. Brown*, 22 K. 222.) Evidence of threats made by the deceased person against the defendant, but not communicated to him before the killing, may be relevant to show that at the time of the meeting the deceased was seeking defendant's life. (*State v. Brown*, 22 K. 222.) Testimony is admissible as to a fight between the deceased and defendant ten months before the homicide, and of the defendant being beaten in that fight; of threats by the defendant a month or two before the homicide; and of his possession of a pistol, the deceased hav-

ing been killed by a pistol ball. (*State v. McKinney*, 31 K. 571.) Assault with intent to kill, good defense to show that prosecuting witness had made prior assault with deadly weapon, and had made threats that came to knowledge of accused. (*State v. Scott*, 24 K. 68.) If place of homicide is located on map, witness may locate surrounding objects. (*State v. McKinney*, 31 K. 570.)

60. The defense in murder case may rebut by showing statements of deceased and his acts, to show Indians were unfriendly, and that he was killed by them. (*State v. Brown*, 21 K. 38.) Evidence of size of deceased competent, on part of state—murder case. (*State v. Potter*, 16 K. 80.) A preliminary examination held on a charge of an assault with intent to kill. On such examination the testimony of the party assaulted was taken, the defendant himself being absent. He could have been present if he had desired, but preferred not to be. Subsequently the party assaulted died, and a charge of murder was preferred in lieu of the original charge of assault with intent to kill. Upon the trial upon this charge, evidence was received of the testimony given by such deceased witness on the preliminary examination. No error. (*State v. Wilson*, 24 K. 189.)

61. The defendant may show conduct of deceased was such as to induce a reasonable belief that he had a deadly weapon. (*State v. Potter*, 13 K. 414.) In a murder case, intoxication is not conclusive evidence of absence of intent to take life; (*State v. White*, 14 K. 538;) and it must be proved, and found by verdict, that homicide was deliberate and premeditated, to constitute murder in first degree; (*Craft v. State*, 3 K. 450;) evidence refused that deceased was stronger than accused, immaterial, when it is admitted by prosecution. (*Wise v. State*, 2 K. 419.)

62. *Objection to.*—Objection to evidence must be first made in the district court. (*State v. Ingram*, 16 K. 14.) An objection to evidence offered must be specific. (*Rheinhardt v. State*, 14 K. 318; *State v. Cole*, 22 K. 474.)

63. *Records*.—A recognizance taken before clerk of district court is void, and cannot be used in evidence. (*Morrow v. State*, 5 K. 563.) Records cannot be impeached collaterally; (*In re Macke*, 31 K. 54;) and where the record does not contain the evidence, it will be presumed to be against appellant; (*State v. Herold*, 9 K. 194;) and an instruction will not be reviewed, the whole evidence not being preserved. (*State v. Cassidy*, 12 K. 550.) A certificate of an officer, that the records show a certain fact, is not competent. (*State v. Ruth*, 21 K. 583.) The district court has no power to require that the records of the county treasurer of one county shall be removed into another county, so that they may be used as evidence. (*State v. Smithers*, 14 K. 629.) Where the probate judge of the county testified that he was probate judge of that county, that he had that position for five or six years, that he was acquainted with the defendant, and that he had never issued any permit to him to sell intoxicating liquors, this was *prima facie* evidence that the defendant had no permit. (*State v. Schweiter*, 27 K. 501.)

64. *Reputation*.—The party against whom a witness is produced has a right to show everything which may in the slightest degree affect his credibility; (*State v. Collins*, 33 K. 77;) and it is competent to ask an impeaching witness who has testified that the general reputation of another witness for truth and veracity in the vicinity in which he lives is bad, whether from that general reputation he would give him full credit upon his oath in a court of justice. (*State v. Johnson*, 40 K. 266.) As a rule, in cases for murder, evidence showing that the deceased was a "quarrelsome, turbulent and violent man," should be excluded; (*State v. Riddle*, 20 K. 711;) and where a party is charged with the crime of grand larceny, it is not competent for the prosecution to initiate the inquiry as to his general character; and evidence in the first instance that the defendant was reported to belong to a gang of horse thieves, is altogether inadmissible. (*State v. Thurtell*, 29 K. 148.) It is error, in a trial of a murder case, to allow the state to prove in the first

instance that deceased was a peaceable man; (*State v. Potter*, 13 K. 414;) and the defendant cannot be prejudiced by proof of other acts of crime than the one for which he is tried, unless one is the fruit of the other. (*State v. Wilson*, 24 K. 189.) Evidence is not incompetent because it tends to show defendant guilty of another crime also. (*State v. Adams*, 20 K. 311.)

65. In a murder case, evidence that the deceased obtained his living by "stealing," struck out of the deposition, not error; (*State v. Rose*, 30 K. 501;) and proof, without grounds, of bad reputation of defendant, not excepted to, and afterwards struck out, is immaterial. (*State v. Furbeck*, 29 K. 533.) If the witness is a disreputable character, jury may weigh her evidence, and give such credence as she deserves. (*Craft v. State*, 3 K. 450.)

66. *Res gestæ*.—The defendant has not a right to offer in evidence the declarations of the party assaulted, made before or after the affray, in reference to it; (*State v. Newland*, 27 K. 764;) and the declarations of prosecuting witness, in absence of accused, some five minutes after assault, not admissible. (*State v. Pomeroy*, 25 K. 349.) The defense may show all of a conversation had by defendant, if state proves a part. (*State v. Brown*, 21 K. 38.) The declaration of the wife of the deceased, made to persons one hour after the death of her husband, that she recognized P. as the person who killed her husband, forms no part of the *res gestæ*. (*State v. Petty*, 21 K. 54.) Evidence that accused was inquiring for deceased a short time previous to homicide is competent. (*State v. Horne*, 9 K. 119.) Where there are two affrays an hour apart by the same parties, the statements made at the one are not part of the *res gestæ* of the other. (*State v. Potter*, 13 K. 414.) The declarations as to possession of land are part of *res gestæ*; (*State v. Gurnee*, 14 K. 111;) and the declaration of departure, "good-bye," part of *res gestæ*, to prove departure, even if given in absence of accused. (*State v. Winner*, 17 K. 298.) In a prosecution against a husband and wife for murder in the first degree, where the wife is tried separately, she has no right to

prove the declarations of her husband made the day before the killing. (*State v. Hendricks*, 32 K. 559.) In a murder case, threats, and the possession of a pistol, and previous fight, are admissible evidence. (*State v. McKinney*, 31 K. 570.) Where circumstances covering the *res gestæ* are sufficient to show character of deceased, and to prove deceased was quarrelsome, the record must show accused was justified in believing himself in danger. (*Wise v. State*, 2 K. 419.)

67. *Variance*.—Charge of larceny against four, trial of one, evidence tending to show joint concealment of stolen property is competent. (*Lewis v. State*, 4 K. 296.) Evidence tending directly to prove defendant guilty may be given, although it tend to prove a distinct felony. (*State v. Folwell*, 14 K. 105.) When the information charges a crime at certain time and place, evidence that defendant was then at a remote place is material. (*State v. Lewis*, 10 K. 157.) The crime of horse stealing is not sustained by proof of larceny of gelding. (*State v. Buckles*, 26 K. 237.)

68. *Venue*.—The place where the offense is charged must be proved. (*Hogan v. State*, 4 K. 89.) Under a charge of administering drugs to destroy an unborn child, evidence of directing medicine to be taken in another county is not error. (*State v. Watson*, 30 K. 281.) The record in this case sustained as properly certified, on a change of venue. (*State v. Riddle*, 20 K. 711.)

68a. *Verdict*.—The verdict will not be set aside as against the evidence in this case. (*State v. Grebe*, 17 K. 458.)

INDICTMENT.

69. Where the appellant was tried upon a *copy* of the indictment, as found on the record, and not upon the original bill signed by the foreman, *held*, that as it would have been proper to show by affidavit that the original bill had been lost or destroyed, and that the omission to file such affidavit, or to place it upon

record if filed, would be merely a "technical error or defect" within the meaning of § 276 of the criminal code (Comp. L. 1862, p. 276), and must be disregarded. (*Millar v. State*, 2 K. 174.) A grand jury called by order of judge in vacation, is a *de facto* grand jury, and indictment by it is good; (*State v. Marsh*, 13 K. 596;) and when the record shows that the indictment was presented by the grand jury in open court, it will be inferred that it was done according to law, through their foreman. (*Laurent v. State*, 1 K. 313.) Where the record shows that the grand jury in a body came into court, and through their foreman presented to the court six bills of indictment, each indorsed "a true bill" and signed by the foreman, and that at that term the grand jury of the state in and for the county, naming it, duly impaneled, sworn and charged to inquire within and for said county, through their foreman (naming him) presented to the court sundry bills of indictment, which are recorded, and among which is the record of one against the defendant, *held*, that the record shows affirmatively that the indictment was returned into court by the grand jury. (*Millar v. State*, 2 K. 174.) The evidence which the law requires, to show a concurrence of the requisite number of the grand jury in finding the indictment, is the indorsement of "a true bill" thereon, and the signature thereto of the foreman. (*Laurent v. State*, 1 K. 313.) Where distinct transactions in cases of misdemeanors are joined in separate counts in one indictment against the same person and followed by one trial for all, the defendant cannot prove by the county attorney, or any witness before the grand jury, that the offenses for which he is being tried were not the identical offenses which the grand jury had in contemplation when finding the indictment, as the grand jury are at liberty to find a bill upon their own knowledge. (*State v. Skinner*, 34 K. 256.) Indictment stating offense, and court having jurisdiction, judgment cannot be arrested; (*Wessels v. Territory*, McC. 100;) and as a general rule it is sufficient if an indictment or information charges an offense in the language of the statute. (*State v. McGuffin*, 36 K. 315.) An indictment direct and certain as to the

party and the offense charged, is sufficient. (*Millar v. State*, 2 K. 174.) Every fact constituting the crime must be set out with particularity. (*United States v. Weld*, McC. 185.)

70. Secs. 87 and 89 of the criminal code of 1859 divest an indictment of all artificial and technical construction, and give to its language its ordinary meaning. (*Smith v. State*, 1 K. 365.) The proper time to raise the question of the sufficiency of the indictment, before verdict, is by motion to quash; after verdict, by motion in arrest of judgment; and *it seems* it is not correct practice after the jury is sworn and trial commenced, by placing a witness on the stand, to move to exclude all testimony under the indictment, on the ground that it does not charge a public offense. *Held*, That to overrule such a motion is not error. (*Rice v. State*, 3 K. 142.) Indictment omitting date of private statute, not a fatal defect. (*Territory v. Reyburn*, McC. 134.) The rule is: If there be any exceptions contained in the same *clause* of the act which creates the offense, the indictment must show negatively that the defendant, or the subject of the indictment, does not arise within the exception. But if a proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defense for the other party, and need not be negatived in the pleading. (*State v. Thompson*, 2 K. 433.) An indictment for selling liquor to Indian, "not a citizen of the United States, nor of the state of Kansas," held sufficient negative statement; (*Laurent v. State*, 1 K. 313;) and in an indictment for selling liquor without license, the pleader, if he attempts to negative the forms of license by name, should include all the different forms of license by which authority to sell liquor may be granted. (*State v. Pitzer*, 23 K. 250.) An indictment founded on sec. 32, crimes act, need not state the degree of the offense. (*Millar v. State*, 2 K. 174.)

71. An indictment for murder in the first degree, verdict manslaughter in the third degree, indictment charged the crime. (*Roy v. State*, 2 K. 405.) Where, under § 240 of the act relat-

ing to crimes and punishments, an indictment charged substantially as follows: The grand jurors "find that J. S. is guilty of the crime of gambling, for that the defendant did play cards for money, checks, and other valuable things, all of which is contrary to the statute," etc.; and the indictment did not in any other manner allege that the defendant bet on said cards, or that he bet at all, or that said cards were a gambling device, or that the defendant bet on a gambling device, or that he bet on any game played by means of a gambling device, the indictment was insufficient. (*State v. Stillwell*, 16 K. 24.) But an indictment charging that the defendant "did unlawfully suffer and permit a gambling device, to wit, a pack of cards, to be used for purposes of gambling and gaming in a house," etc., kept by him, *held*, not good on a motion to quash. (*State v. Hardin*, 1 K. 474.) The section on which the indictment was found, (§ 320, crimes act, Comp. Laws, 333,) having prohibited by name the setting up or keeping "faro banks," it was not necessary to set forth in the indictment that it was a gambling device, "adapted, devised and designed for the purpose of playing any game of chance for money or property." Other devices than those named in the act must be charged to be "adapted, devised," etc.; and, where in such case it is alleged that "persons did bet and play at the game," an allegation that money or property was bet, or lost or won on the device is not necessary. (*Rice v. State*, 3 K. 141.) An indictment for keeping "faro bank," persons playing unknown; it is not error to refuse to charge that if witness' name was known they must acquit. (*Rice v. State*, 3 K. 141.) An indictment for poisoning will not be quashed, although it may contain surplusage and repugnant allegations; and an indictment for poisoning, omitting "feloniously," not fatal. (*Madden v. State*, 1 K. 340.)

72. Where an indictment for murder charged substantially that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased, by shooting him with a pistol loaded with gunpowder and leaden balls, and thereby inflicted a mortal wound, from which mortal wound the deceased

died, but did not anywhere charge that the defendant committed the assault and battery, or did the shooting or killing, with the deliberate or premeditated intention of killing the deceased, *held*, that the indictment did not charge murder in the first degree. (*State v. Brown*, 21 K. 38.) Where an indictment for murder charges that the killing was done by J. T., W. B., and T. C., by shooting the deceased with pistols and revolvers, such indictment is not insufficient because it alleges that "said pistols and revolvers the said J. T., W. B., and T. C. then and there in their right hands held," when they did the shooting. (*State v. Brown*, 21 K. 38.) In an indictment for murder, where the indictment does not charge that the killing was done by means of poison, or by lying in wait, or in the perpetration or attempt to perpetrate any felony, the indictment must charge that the killing was done deliberately and premeditatedly. (*State v. Brown*, 21 K. 38.) And an indictment for murder in the first degree must allege deliberate and premeditated will or intent to kill, unless in the excepted cases. (*Smith v. State*, 1 K. 365; *State v. Petty*, 21 K. 54.) Indictment for assault with intent to kill and conviction of assault in a minor degree; though not indictable for that, court had jurisdiction. (*Guy v. State*, 1 K. 448.)

73. An indictment setting forth, first, a willful, deliberate and premeditated assault; second, a willful, deliberate and premeditated shooting and wounding; third, that the wounding was mortal, and that the wounded man instantly died; and closing as follows: "The said B. S., him the said J. D., in the manner and by the means aforesaid, unlawfully, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, did kill and murder," etc., contains a sufficient allegation of the intent. (*Smith v. State*, 1 K. 365.) Where an indictment charges that K., the defendant, unlawfully, feloniously, and with malice aforethought, assaulted, with intent to kill, F., with a deadly weapon, to wit, a pistol loaded with powder, cap and leaden ball, then and there in the hands of K., and is otherwise sufficient, the indictment is not bad because it does not more

definitely charge that F. was the party assaulted. (*State v. Knadler*, 40 K. 359.) The forfeiture of ferry franchise cannot be tried on indictment. (*Territory v. Reyburn*, McC. 134.) An indictment under fugitive slave law must allege defendant knew he was a slave. (*United States v. Weld*, McC. 185.) An indictment Dec. 5, 1865, signed as "district attorney," not void; district attorney held office till January, 1866. (*Craft v. State*, 3 K. 450.) An indictment in Jefferson county, signed "A. S., County Attorney of Jackson county." The defendant admitted in open court that A. S. was, in fact, at the time of the filing of the indictment, county attorney of Jefferson county. It was error for the court below to grant the motion to quash. (*State v. Tannahill*, 4 K. 117.)

74. An indictment found by grand jury of Chase, when the offense was committed in Marion, attached for judicial purposes, sustained. (*Wise v. State*, 2 K. 419.) An indictment is bad that does not lay the venue in any county; (*Territory v. Freeman*, McC. 56;) but an indictment charging "at Ogden, in the county of Riley, aforesaid," caption and body giving the state, sufficient. (*State v. Muntz*, 3 K. 383.) The place of the alleged offense of selling intoxicating liquors without license must be so described in the indictment as that an officer executing process would be able to identify it; (*Hagan v. State*, 4 K. 90;) and an indictment under dramshop act—place in a stone building, used and occupied by the defendant as a grocery and dwelling house, at the time of sale, at Ogden, Riley county, held sufficient. (*State v. Muntz*, 3 K. 384.)

INFORMATION.

75. An information charging "assault and battery" held to be same as "assault and beat." (*State v. Beverlin*, 30 K. 611.) An information is not insufficient, because it states in one count that the assault, battery and killing, charged against the defendant, were done by means of "some deadly weapon or instru-

ment, the kind and description of which are unknown," and then states, in another count, that such assault, battery and killing were done by means of the defendant's "hand and fist." (*State v. O'Kane*, 23 K. 244.) An information charging an assault with a deadly weapon, to wit, a revolving pistol, loaded with powder, leaden ball, and cap, with the intent to kill, is not fatally defective by an omission to state more fully the manner of the assault, or the mode in which the pistol was used, or attempted to be used. (*State v. Miller*, 25 K. 699.) To constitute the crime of burglary, an information is fatally defective which fails to charge an entry. (*State v. Whitby*, 15 K. 402.) Where a defendant was charged with having willfully, forcibly, feloniously and burglariously broken and entered in the night time a store of C. & S., such information is not fatally defective upon a motion to quash, because it fails to describe more specifically the manner of breaking and entering the store. (*State v. McAnulty*, 26 K. 533.)

76. Carnal knowledge, female under eighteen—crime prohibited by § 233, crimes act—may be committed against an unchaste person, consenting; and where the female under eighteen is confided to his care by parents, the information is sufficient, though it may not allege parents were guardians, or that defendant knew she was under eighteen years of age. (*State v. Jones*, 16 K. 608.)

77. Trial by information under state law is not contrary to United States constitution. (*State v. Barnett*, 3 K. 250.) Where an information charges an assault with intent to kill with a revolver, and verdict of guilty as charged, defendant may be convicted of simple assault and battery, special instructions not having been asked, and evidence not preserved. (*State v. Cooper*, 31 K. 505.) The exact words used in a criminal statute defining a public offense are never required to be used in a criminal information charging such offense, but any equivalent words, or any words clearly and intelligibly setting forth the offense, are all that are required; (*State v. Hart*, 33 K. 218;) and it is not necessary in an information to use the exact words

of the statute in charging an offense; it is sufficient if words are used conveying the same meaning. (*State v. White*, 14 K. 538.) Information need not describe the offense in the exact words of the statute; (*State v. Barnett*, 3 K. 250;) and words used in statute to define public offense need not be strictly pursued. (*State v. Beverlin*, 30 K. 611.) In charging statutory offenses, except in those cases in which the statute simply designates and does not describe or name the constituent elements of the offense, it is generally safe to use the language of the statute. (*State v. Foster*, 30 K. 365.) An information is good that states the nature of the offense charged, with accuracy, precision and certainty, so that the accused cannot be misled as to the charge he has to answer, nor the court in doubt as to the judgment to be pronounced on a verdict. (*State v. McCord*, 8 K. 232.) An information charging an assault is sufficient if it states the facts constituting the offense in general terms. (*State v. Finley*, 6 K. 366.) Information under §§ 31 and 283, of crimes act, may be good without using word "rape." (*State v. Hart*, 33 K. 218.) Where an information follows the language of the statute in charging the crime of murder in the first degree, the use of the words "of malice and aforethought" is not essential to its validity. (*State v. Fooks*, 29 K. 425.)

78. The description of the kind of funds embezzled by county treasurer is unnecessary. (*State v. Smith*, 13 K. 274.) In an information under § 134 of the crimes act, a charge that the defendant "passed, uttered and published" the forged instrument is a statement of fact and not of a conclusion of law, and is sufficient. (*State v. Foster*, 30 K. 365.) A criminal information attempting to charge the offense of attempting to obtain certain personal property by false pretenses, is not insufficient, because it fails in express terms to allege that the defendant failed, or that he was prevented. (*State v. Decker*, 36 K. 717.) An information purporting to charge the offense of obtaining money or property by the means of false pretense, under § 94, ch. 31. p. 339, Comp. Laws of 1879, must allege that the defendant did obtain from another, personal property, right in action, or other

valuable thing or effects; and if the word *obtained* is not used, other words must be employed equivalent thereto. (*State v. Lewis*, 26 K. 123.) An information purporting to charge the offense of obtaining money and property by means of false pretenses, that only alleges the accused was paid money, checks and drafts by the party alleged to be defrauded, and nowhere charges that the accused *obtained* anything, nor contains words equivalent thereto, is fatally defective. (*State v. Lewis*, 26 K. 123.)

79. A charge that certain persons caused one of their number to have his life insured for the benefit of his wife, and then falsely pretended that the insured was injured, that he died and was buried, that his body was stolen from the grave; that all was done for the purpose of obtaining the insurance money from the insurer; and that they were frustrated in the attempt before the offense was consummated; without alleging to whom the false representations and pretenses were made; and without stating that the beneficiary in the policy was connected or co-operated with them in the attempt, or had any knowledge of their acts or purposes; and which does not state that the defendants intended to lead the beneficiary to believe that the insured was dead, or to procure her to present a claim for the insurance money, or to obtain from her the policy or a transfer of the same, and which did not aver the means by which the money was intended to be obtained, does not constitute a punishable attempt to obtain money by false pretenses. (*In re Schurman*, 40 K. 533.) Where the information charges the embezzlement of a gelding which has been delivered to the accused as bailee, it need not allege the value of the property, as the statute provides that, upon conviction therefor, the party so charged shall be adjudged guilty of larceny. (*State v. Small*, 26 K. 209.) Ch. 83 of the Laws of 1873, amending § 88 of ch. 31, General Statutes, includes within its provisions a county treasurer as liable to the penalties for embezzlement. (*State v. Smith*, 13 K. 274.) An information gave a copy of an order and judgment sentencing the defendant, J. H., to be imprisoned in the peni-

tentiary, and then stated that while the defendant was "in the lawful custody of the sheriff," "under and by virtue of the order and judgment aforesaid, *as entered of record*," "and while going to the place of confinement aforesaid, to wit, to the penitentiary of the state of Kansas," "under and by virtue of said order and judgment aforesaid, the said J. H. did, at Marion Center," "then and there feloniously break such custody of the sheriff," "and did then and there escape therefrom;" but did not state that the sheriff had, at any time, a certified copy of the said sentence, as is required under § 256 of the criminal code, or that he had any other paper under which or by which to hold the said defendant in custody. Said information was defective, and rightfully quashed. (*State v. Hollon*, 22 K. 580.) An information which, in one count, charges the defendant with embezzling certain property received by him as the "agent, servant, employe and bailee" of the owner, is not objectionable on the ground that it charges two separate and distinct crimes." (*State v. Lillie*, 21 K. 728.) The offense of burglary and larceny, where each constitute a part of the same transaction, may both be charged in the same count, and the defendant may be found guilty of the larceny only. (*State v. Brandon*, 7 K. 106.)

80. Where an information charges that a defendant took away female under the age of eighteen years from her father, without his consent, for the purpose of prostitution *and* concubinage, there is a joinder of two distinct offenses in one count, and therefore the information is bad, for duplicity. (*State v. Goodwin*, 33 K. 538.) An information in liquor case may pursue the language of the statute, charging the commission of the several acts conjunctively, as constituting all together one offense. (*State v. Schweiter*, 27 K. 499.) In the case of misdemeanor, the joinder of several offenses will not in general vitiate the information in any stage of the prosecution; (*State v. Schweiter*, 27 K. 499;) and separate public offenses, where they are all misdemeanors of a kindred character, and charged against the same person, may generally be joined in separate counts in one information, to be followed by one trial for all, with a separate conviction

and punishment for each, the same as though all such offenses were charged in separate informations and tried at different times. (*State v. Chandler*, 31 K. 201.) While two or more felonies may, under proper circumstances, be joined in one indictment or information, they must, as a general rule, be in separate counts. A less stringent rule applies to prosecutions for misdemeanors. (*State v. Goodwin*, 33 K. 538.)

81. A motion in arrest of judgment because information does not state facts, etc.; new trial granted and *nolle* entered; a plea of former jeopardy cannot be entered to new information; and after new trial is awarded defendant, a *nolle* may be entered, and new information filed. (*State v. Hart*, 33 K. 218.) Information filed while indictment is pending, the latter *nollied* is not a bar; (*State v. McKinney*, 31 K. 570.) The district court has original and concurrent jurisdiction with justices of peace, to hear and determine criminal prosecutions, where the punishment to be imposed cannot exceed a fine of \$500, or imprisonment in the county jail one year. And the prosecution in the district court may be upon information filed by the county attorney. (*State v. Brooks*, 33 K. 708.) Where information charges no offense, but justice decides that it does, he is not liable for error in judgment. (*Clark v. Spicer*, 6 K. 440.) A county attorney may file an information in vacation for a misdemeanor cognizable before a justice of the peace, and of which the district court also has jurisdiction. (*In re Eddy*, 40 K. 592.) An information for larceny, where the only description of the property stolen is "national bank notes, United States treasury notes, and United States silver certificates, money of the amount and value of one thousand dollars," without any allegation of the inability of the prosecutor to give a more specific description, is insufficient. (*State v. Tilney*, 38 K. 714.)

82. Where an information for larceny states only the collective value of sundry silver coins alleged to have been stolen, and then describes the coins as follows, to wit: "Current as money in the state of Kansas, consisting of five-cent pieces of nickel, commonly called 'nickels;' of quarter-dollar silver pieces, com-

monly called 'quarters;' of ten-cent silver pieces, commonly called 'dimes;' of half-dollar pieces, commonly called 'half dollars;' of one-dollar silver pieces, commonly called 'dollars;' of certain foreign coins of various denominations;" and further alleges that "a more particular description of any and of all such money cannot be given, as informant has no means of obtaining knowledge," the information contains a sufficiently definite description. (*State v. McAnulty*, 26 K. 533.) The defendant was charged with "stealing national bank currency and United States treasury notes of the amount and value of one hundred and sixty-four dollars." The information cannot, on a motion in arrest of judgment, be held to be insufficient on the ground of a supposed insufficiency in the description of the property stolen. (*State v. Henry*, 24 K. 457.) Druggist selling liquor improperly for medical, scientific or mechanical purposes must be prosecuted under section 9. (*State v. White*, 31 K. 342.) Under § 13 of the prohibitory law, the information must charge the defendant is "owner or keeper." (*State v. Nickerson*, 30 K. 545.) In an information, it is unnecessary to state the kind or class of the liquor, but it is sufficient to charge that the defendant sold intoxicating liquors at the time and place. (*State v. Sterns*, 28 K. 154; *State v. Brooks*, 33 K. 708.) Under § 7 of the prohibitory law, a charge that defendant sold and kept for sale is sufficient; (*State v. Nickerson*, 30 K. 545;) and it is not necessary to state to whom sold. (*State v. Schweiter*, 27 K. 499.) A sale of liquors without permit, or having a permit, sale for other than medical, scientific, or mechanical purposes, is illegal. (*State v. Shackle*, 29 K. 499.) A sale by a member of a liquor club held to be a device. (*State v. Nickerson*, 30 K. 545.)

83. In an information for murder, the location of the wound is sufficiently described as "upon the body." (*State v. Yordi*, 30 K. 221.) In an assault to kill, the information omitting "malice aforethought," not fatal, having charged felonious intent to kill. (*State v. White*, 14 K. 538.) An information for murder in the first degree that describes the killing, and clearly alleges

that the killing was done willfully, unlawfully, feloniously, and with deliberation, premeditation, and malice aforethought, is sufficient. (*State v. Jackson*, 27 K. 581.) An information which, after alleging time and place, states that the defendant feloniously, willfully, deliberately, premeditatedly, and with malice aforethought, assaulted, struck, stabbed and cut H. with a knife, inflicting a mortal wound, from which H. died, and then concludes by charging that the defendant, in the manner and form aforesaid, did feloniously, willfully, deliberately, premeditatedly, and of malice aforethought, kill and murder H., sufficiently charges an intentional murder. (*State v. Smith*, 38 K. 194.) Where in an information all the elements of the crime of murder in the first degree, as defined in the statute, are embraced the use of the words "that the defendant, him, the said deceased, in manner and form aforesaid, feloniously did kill and murder," is not essential to its validity. (*State v. Fooks*, 29 K. 425.) An information for murder is not insufficient because it charges three defendants caused death with pistols in their right hands; (*State v. Brown*, 21 K. 38;) and omitting to charge "intent to kill," except in closing part, held sufficient in this case, not having been attacked till after verdict. (*State v. Harp*, 31 K. 496.) An information need not state waiver of preliminary examination, but question may be raised by plea. (*State v. Barnett*, 3 K. 250.)

84. Where a person is charged under § 7, ch. 128, Laws of 1881, with selling and bartering intoxicating liquors without taking out and having a permit therefor, it is unnecessary to state in the information the name of the person to whom the liquors were sold and bartered. (*State v. Schweiter*, 27 K. 500.) Where the person injured is so well described, and his name is so given that his identity cannot be mistaken, the object of the rule has been accomplished. (*State v. Witt*, 34 K. 488.) An information charging a person with forgery in the third degree under § 139 of the crimes act, should name the particular person intended to be defrauded, if such a person is known. If, however, the effect of the forgery will not necessarily

defraud a particular person, but will defraud some one, a general allegation of intent to defraud must be made. (*State v. Gavigan*, 36 K. 322.) An information which charges the commission of burglary by the breaking and entering into a certain store building in the night time with intent to steal, but which does not state or show who the owner of the building was, or whether it was owned or possessed by any person or not, is not sufficient. (*State v. Fockler*, 22 K. 542.) An information which charges property of "Michael W.," proof "J. M. W.," will not sustain a verdict. (*State v. Taylor*, 15 K. 420.) The name "Mollie Brown" is the same as "Mary Brown." (*State v. Watson*, 30 K. 281.)

85. Crime, prosecution for keeping nuisance, an information not defective for failure to charge defendant "had no permit." (*State v. Teissedre*, 30 K. 477.) Under dramshop act, an information saying defendant "had no county license for dramshop in town of —," was not sufficient. (*State v. Pittman*, 10 K. 593.) An information omitting "did not as a druggist sell the liquors above mentioned to some other druggist," held good. (*State v. Hunt*, 29 K. 762.) And an information charging selling liquor to Indian, "not a citizen of the United States, nor of the state of Kansas," held sufficient negative statement. (*Laurent v. State*, 1 K. 313.)

86. An information in a prosecution for perjury is insufficient where there is no allegation that the false testimony was given in any cause, matter or proceeding before any court, tribunal, public body, or officer; (*State v. Ayer*, 40 K. 43;) and where the false testimony alleged to have been given is inserted in detail in the indictment charging the defendant with perjury, and it clearly appears from the indictment that the testimony alleged to be false was not material to the issues of the case in which it was given, and had no tendency whatever to affect or influence the judgment of the court or jury, the indictment is fatally defective. (*State v. Smith*, 40 K. 631.)

87. It is not necessary that the information itself should show that a preliminary examination had been first had before

the filing of the information, nor show a legal cause for filing the same without such preliminary examination. (*State v. Finley*, 6 K. 366.) In a charge for embezzlement, *as city clerk*, information for *clerk, agent, servant*, special plea of no preliminary examination overruled. (*State v. Spaulding*, 24 K. 1.) The sufficiency of an information must be determined by the rule governing indictments, and neither can be quashed for such an omission. (Crim. Code, § 96, p. 252.) (*State v. Barnett*, 3 K. 250.)

88. Where an information contains allegations sufficient to constitute the crime charged, such information must, on motion to quash, be held sufficient, although it contains repetitions, surplusage and redundant allegations. (*State v. Furney*, 41 K. 115.) An information for robbery which describes the property as "twenty-five dollars in money, the property of John Bond," and without any allegation of its value, or any excuse for want of greater particularity, is fatally defective. (*State v. Segermond*, 40 K. 107.) An information signed and filed by the proper prosecuting officer, who describes himself in such information as "prosecuting attorney," and not as "county attorney," will be held sufficient. (*State v. Tannahill*, 4 K. 117; *State v. Nulf*, 15 K. 404.) A paper, in form of an affidavit of the prosecuting witness, signed as prosecutor, and sworn to by him, without the prosecuting attorney's name appearing, is not an information. The signing of the paper by the prosecuting attorney, by permission of the court, after the trial has commenced, does not cure the error. (*Jackson v. State*, 4 K. 150.) An objection to evidence proper when information is not signed by prosecuting attorney. (*Jackson v. State*, 4 K. 150.)

89. It is not error to permit the county attorney to amend the information by changing the figure 3 to 2, so as to show a date anterior to that of the filing of the information. (*State v. Cooper*, 31 K. 505.) It is error for the court to quash a criminal information charging larceny "for the reason that the said information was not filed at the first term of said court after

the defendants' arrest, and at which they personally appeared as required by law." (*State v. Baird*, 10 K. 58.) Filing April 15th, court having adjourned from March 29th to April 22d, motion to strike from files because not filed in term, or within twenty days, overruled; (*State v. Babbitt*, 32 K. 253;) and filed within twenty days preceding term, clerk may issue warrant as soon as practicable. (*State v. Schweiter*, 27 K. 499.) It is not requisite that the precise time of the commission of an offense should be pleaded, if it is shown to have been within the limitation prescribed by statute. (*State v. Barnett*, 3 K. 250.) Where an information for murder alleges the offense was committed "on or about the 11th day of August, 1882," the averment as to time is sufficiently certain and specific. (*State v. Harp*, 31 K. 496.) Where a county attorney files an information on October 15, 1884, and states that the offense was committed on the—day of—, 1884, and does not state the day or the month when the offense was committed, the information is nevertheless sufficient. (*State v. Brooks*, 33 K. 708.) In a prosecution for bigamy, it is not necessary to allege in the information or indictment the exact time and place of the first marriage. (*State v. Hughes*, 35 K. 626.)

90. The title to land is not material, in an action for malicious trespass to crops. (*State v. Gurnee*, 14 K. 111.) And an information in an action of trespass on school lands must aver value of property injured, or damages sustained. (*State v. Grewell*, 19 K. 189.)

91. An information for murder is sufficient which charges the giving of the fatal blow in the county in which the prosecution is had, and the fact of ensuing death, although it failed to allege specifically in what county or state the death took place; (*State v. Bowen*, 16 K. 476.) An information located house, lot, block, city of Ottawa, county of Franklin, against the peace, etc., of the state of Kansas; venue sufficient. (*State v. Walter*, 14 K. 365.) The court did not commit any error affecting the substantial rights of the defendant in permitting, pending the trial, the prosecutor to strike from the information the words,

"situated on fractional lots 14, 15 and 16, in block 24." (*State v. Sterns*, 28 K. 154.)

92. The verification of an information by a prosecuting attorney, upon information and belief, is sufficient. (*State v. Montgomery*, 8 K. 351; *State v. Nulff*, 15 K. 404.) But see *State v. Gleason*, 32 K. 245. The information was amply sufficient in its statements of the offense charged against the defendant, and it was verified by the county attorney upon information and belief. The defendant moved to quash the same, and the court overruled the motion. *Held*, Not error; and this although the statements of witnesses attached to the information may not have stated any offense. (*State v. Clark*, 34 K. 289.) Where an information is sworn to positively by some person, it is not necessary for the county attorney to also verify the information by his own oath. (*State v. Brooks*, 33 K. 708.) Where the affidavit annexed to an information charging the defendant with violations of the prohibitory liquor law is verified by the county attorney "to the best of his information and belief," and the sworn statements of witnesses are filed by the county attorney with the information, disclosing the fact that offenses have been committed by the defendant against the provisions of said act, as charged in the information, *held*, that the verification sufficiently complies with the requirements of the statute; (*State v. Whisner*, 35 K. 271;) but where an information for selling liquor, etc., is verified by private person and not by the county attorney, conviction should not be had except of some offense said witness had knowledge of at time of verification. (*State v. Brooks*, 33 K. 708.) But where a county attorney, by virtue of the prohibitory liquor law, examines various witnesses, who give their testimony before him, which is reduced to writing and sworn to by them and filed with the information, and the information so filed is verified by the county attorney on information and belief only, and the names of the witnesses so examined are indorsed upon the information, *held*, that the defendant cannot be convicted of any violations of said act not therein referred to or set forth. (*State v. Whisner*, 35 K.

271.) It is declared by § 15 of the bill of rights in the constitution of the state of Kansas, that no warrant shall be issued to seize any person but on probable cause, supported by oath or affirmation; therefore a complaint or information filed in the district court charging a defendant with a misdemeanor, and verified on nothing but hearsay and belief, is not sufficient to authorize the issuance of a warrant for the arrest of the party therein charged, when no previous preliminary examination, and no waiver of the right of such examination, have been had. (*State v. Gleason*, 32 K. 245.) But a defect in the verification of an information is waived by going to trial. (*State v. Otey*, 7 K. 69; *State v. Ruth*, 21 K. 583.)

93. Where a defendant without objection pleads to the merits of the action and goes to trial, he waives all irregularities in the verification of the information, and cannot afterward be heard to question the regularity. (*State v. Blackman*, 32 K. 615.) Where the defendant, without making any objection to the sufficiency of the warrant, or the sufficiency of the information, or the sufficiency of the verification thereof, enters into a recognizance for his appearance at the next term of the court, and is thereby discharged from arrest, he waives any supposed defects in the verification of the information, and cannot afterward for that reason, and upon motion, have the warrant quashed or set aside; (*State v. Longton*, 35 K. 375;) but where the clerk fails to attach his signature and seal to the jurat of an affidavit verifying an information, and the defendant pleads not guilty to the information while so defective, it is not error for the court to permit the clerk before a jury is called to perfect a jurat by attaching his signature and seal. (*State v. Adams*, 20 K. 311.) The court may permit names of additional witnesses to be indorsed on an information, and allow them to testify. (*State v. Teissedre*, 30 K. 477; *State v. McKinney*, 31 K. 570.) It is discretionary with court to permit name of witness to be indorsed on information after trial begins; (*State v. Cook*, 30 K. 82; *State v. McKinney*, 31 K. 570;) and a witness whose name was not indorsed on information may testify. (*State v. Dickson*, 6

K. 209; *State v. Medlicott*, 9 K. 257.) So where the county attorney by mistake indorsed J. W. Stilwell on the information, but the court, nevertheless, permitted J. M. Stilwell to testify in the case, not error. (*State v. Blackman*, 32 K. 615.) The indorsing the name *William Porter*, evidence of sale to W. R. Porter, no objection made, verdict not set aside. (*State v. Drake*, 33 K. 151.)

INSANITY.

94. The question of the defendant's sanity or insanity may be tried along with all the other questions in the case. (*State v. Gould*, 40 K. 258.) Where the defense of insanity is set up, it does not devolve upon the defendant to prove that he is insane, by a preponderance of the evidence; if there should be a reasonable doubt as to whether the defendant is sane or insane, he must be acquitted. (*State v. Crawford*, 11 K. 32.) An instruction that "in order to entitle the defendant to an acquittal, he is required only to raise a reasonable doubt as to his sanity," modified as follows: "In order to entitle the defendant to an acquittal, he is required only, by evidence, to establish a reasonable doubt as to his sanity." (*State v. Mahn*, 25 K. 182.) Where habitual unsoundness of mind is once shown to exist, it is presumed to continue to exist until the presumption is rebutted by competent proof, beyond a reasonable doubt. (*State v. Reddick*, 7 K. 143.) The trial court did not err in refusing to give an instruction referring to morphine as a cause for such supposed insanity or disease of the mind. (*State v. Mahn*, 25 K. 182.) Where a witness testifies to certain events in the history of the accused, the object of which is to show a tendency to bring on a diseased condition of the brain, the witness may, on cross examination, be asked to state what in his judgment was the effect upon the mind of the defendant of the injuries described. (*State v. Reddick*, 7 K. 143.)

95. A physician and surgeon of many years' practice and

experience, who has studied psychological medicine, and has had experience in the incipency of mental diseases, may give his opinion whether the manner in which the act was done, the circumstances of the absence or presence of apparent motive, and the whole details of the transaction, would be considered by scientific men in determining the question of sanity or insanity, although the witness had not shown that he had made diseases of the mind a special study. (*State v. Reddick*, 7 K. 143.) The omission to charge that if the defendant knew the act to be wrong, but was driven to it by an irresistible impulse arising from an insane delusion, he would not be responsible, was not error. (*State v. Mowry*, 37 K. 369.) The trial court did not err in refusing to give an instruction, substantially given in other instructions. (*State v. Mahn*, 25 K. 182.) In a criminal prosecution, where the jury entertain a reasonable doubt as to whether the defendant is sane or insane with respect to the particular acts charged against him, they should acquit. (*State v. Nixon*, 32 K. 105.)

INSTRUCTIONS.

96. The defendant cannot complain that explanatory instructions were not given, if they were not asked; (*State v. Rhea*, 25 Kas. 576; *State v. Ingram*, 16 K. 14; *State v. Potter*, 15 K. 302;) and the defendant cannot be heard to complain of an instruction requested by himself; (*State v. Baldwin*, 36 K. 1; *State v. Reddick*, 7 K. 143;) and a party who desires an instruction upon some particular question not included in the general charge should request the presiding judge to give the same. (*State v. Pfefferle*, 36 K. 90.) So where the instructions of the trial court to the jury seem to be sufficient, and no further or additional instructions were asked for, the trial court did not err in failing to give additional instructions. (*State v. Shenkle*, 36 K. 43.) Where the court properly instructs the jury, except that it omits some matter which might properly be given, no

available error is committed, unless the court has been properly requested to instruct with reference to such matter. (*State v. Peterson*, 38 K. 204.) It is error for the court, in a prosecution for felony, to recall the jury and give further instructions while the defendant is absent and under confinement in jail. (*State v. Myrick*, 38 K. 238.)

97. As a general rule, where the jury in a criminal case return into court in the presence of the parties and say they cannot agree, it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulty in their minds. (*State v. Chandler*, 31 K. 201.) The information charged that the burglary alleged was committed in breaking and entering the store of John C. Clark and Frank G. Sutton, partners doing business under the firm name of Clark & Sutton. The court committed no material error in not repeating the full names of each member of the firm in its charge upon the question of the ownership of the building. (*State v. McAnulty*, 26 K. 533.) "It is claimed that a violated law, by the commission of a brutal and blood-curdling, cruel crime lies in one scale of the balance, and the liberty and life, all that there is dear and valuable in life to the citizen, freights the other. I have already instructed you that the defendant is presumed innocent until his guilt is made to appear beyond a reasonable doubt, to be determined by the rules given you in these instructions. No disastrous consequences to result to the defendant as the results of your verdict, or the clamors of a discontented populace, can properly find place for consideration in your deliberations; but the imperative and inexorable demands of the duty imposed on you are, to seek for the truth and fearlessly pursue it in your verdict." It cannot be presumed that there was no occasion for cautioning the jury against the improper influences named. (*State v. McKinney*, 31 K. 570.) Where the defendant is prosecuted with others upon the theory that all conspired together to commit the crime, and there is testimony supporting it, a direction to the jury that if they found that one of the defendants was not actually pres-

ent when the crime was committed they should acquit him, was properly refused. (*State v. Johnson*, 40 K. 266.) The court must give all the law, and the law of manslaughter and murder in second degree, in charge of murder first degree; (*Craft v. State*, 3 K. 450;) but failing to give the law of manslaughter was held not to be error in this case. (*State v. Hendricks*, 32 K. 559.) So instructions upon an offense inferior in degree and included in the one charged should not be given, unless there is some evidence tending to show that the defendant is guilty of such offense. (*State v. Mowry*, 37 K. 369.)

98. When the instructions complained of relate to a degree inferior to that of which the defendant is convicted, they will be deemed not to have prejudiced the defendant. (*State v. Dickson*, 6 K. 209; *State v. Potter*, 15 K. 302.) An instruction in an abortion case, using the words, "any medicine, drug, or substance," not erroneous instruction. (*State v. Watson*, 30 K. 281.) The accused can only claim the benefit of *reasonable* doubts. (*State v. Cassady*, 12 K. 550.)

99. It is not error for the court to refuse a special instruction that if any one of the jury entertain a reasonable doubt of the defendant's guilt there must be an acquittal. (*State v. Witt*, 34 K. 488.) Reasonable doubt not clearly defined in instruction given; (*State v. Bridges*, 29 K. 138;) and reasonable doubt instruction not modified by other instruction in this case. (*State v. Adams*, 20 K. 311.) Where an instruction is asked, which in a distinctive statement presents two conditions of acquittal, and there is error in one of these conditions, the court may properly refuse the whole instruction. (*State v. Cassady*, 12 K. 550.)

100. If a witness be impeached by proof of his having previously made statements out of court inconsistent with his testimony he may then be corroborated by evidence of other statements made by him out of court in harmony with his testimony, made before he has had any reason or ground for fabricating an untrue or false statement. (*State v. Hendricks*, 32 K. 559.) Where an instruction is asked that if a particular witness, nam-

ing him, has testified falsely, etc., the jury should disregard his entire testimony, it is not error for the court to refuse such instruction, and substitute one that if *any witness* testified falsely, etc. (*State v. Kellerman*, 14 K. 135.) A refusal of the court below to charge the jury, that "if the jury believe from all the evidence that the witness has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony," was error. (*Campbell v. State*, 3 K. 488.) It is error for a court to instruct the jury that, "if any witness has willfully testified falsely as to any material fact in the case, then the jury *should* disregard all the testimony of such witness." (*Shellabarger v. Nafus*, 15 K. 547; *State v. Potter*, 16 K. 80.) And *falsus in uno, falsus in omnibus*, asked as to one witness, may be made to apply to all. (*State v. Kellerman*, 14 K. 135.) And where the witness is a disreputable character, jury may weigh her evidence, and give such credence as she deserves. (*Craft v. State*, 3 K. 450.)

101. Where the court, in reference to the testimony of an accomplice, advised the jury that it was unsafe to give it entire effect "unless he is so far corroborated as that the corroborating testimony shall render his statements credible;" and that the corroboration "need not be as to everything to which he has testified, but if he be so far corroborated that the jury are convinced that he has told the truth;" and also gives fully and clearly the reasons which render it unsafe to rely on such testimony: *Held*, No error, although it was not said in express terms that the corroboration should be as to some material fact. (*State v. Adams*, 20 K. 311.) The court deciding to the effect that one witness had sworn false, and impeaching witness the truth, material error, jury finding defendant guilty. (*State v. Hughes*, 33 K. 23.) The following instruction: . . . "In considering the testimony you should not draw any unfair inferences or unjust conclusions against the defendant because of any failure or omission on his part to offer any particular kind of evidence, but he should be tried alone upon the facts proved," not error. (*State v. Skinner*, 34 K. 256.) Circumstantial evidence must

not be inconsistent with any other rational conclusion. (*Horne v. State*, 1 K. 42.)

102. Instructions given which were not excepted to will not be reviewed in the supreme court; (*State v. English*, 34 K. 629;) and error in instructions must be pointed out. (*State v. Gurnee*, 14 K. 111.) Conviction authorized, if offense occurred prior to law, error; but from no exceptions and other matters, new trial will not be granted. (*State v. Wilgus*, 32 K. 126.) An exception "to the instructions given" not sufficient. (*State v. Wilgus*, 32 K. 126.) Whether instructions, signed and filed, become part of the record in *criminal* cases, is not decided. (*State v. Lewis*, 10 K. 157.) In a prosecution for keeping a faro bank, instruction that it is sufficient to show he had control, is good. (*Rice v. State*, 3 K. 141.) Instructions should run to the facts as detailed by the evidence, but not to questions which, though possible under the information, are not in fact presented by the evidence. (*State v. Hendricks*, 32 K. 559.)

103. The jury are the exclusive judges of all questions of fact. (*Horne v. State*, 1 K. 42.) The court is required to determine whether there is any evidence of a particular material fact; the jury are the judges of the facts. (*Craft v. State*, 3 K. 450.) It is the province of the jury to weigh the contradictory and conflicting evidence; (*State v. Potter*, 16 K. 80;) and a jury have a right to believe part of statements of accused and reject balance, in explanation of possession of stolen property. (*State v. Ingram*, 16 K. 14.)

104. It is not error to refuse instruction in larceny that *taking* is material, and must be established, when the court instructs that they must believe he stole, took and carried away. (*State v. Kellerman*, 14 K. 135.) "The possession of property, proven to have been recently stolen, is evidence from which the jury may infer that the person in whose possession such property is found is guilty of the theft, provided that such possession is not explained," not erroneous, although the property stolen was national bank currency and United States treasury notes. (*State v. Henry*, 24 K. 457.)

105. An instruction may be correct as an abstract proposition, and yet may be misleading. (*State v. Ingram*, 16 K. 14.) The fatal effect of a separate and an erroneous charge to a jury, upon a material point, is not cured by the court having, in other parts of the charge, given the true rule of law as applicable to that point. (*Horne v. State*, 1 K. 42.) The mere misuse of a word in one part of the charge, which it appears could not have misled the jury, will not warrant a reversal. (*State v. Miller*, 35 K. 328.) An instruction which, though correct as an abstract proposition, seems likely without some explanation or qualification to mislead the jury, may properly be refused. (*State v. Ingram*, 16 K. 14.) It is proper for the court below to refuse an instruction, though it is law, when not applicable to the facts proved. (*Lewis v. State*, 4 K. 296.) Instructions which are not necessary, and which are not calculated to assist the jury in deciding on the issues submitted to them, ought not to be given. (*State v. Medlicott*, 9 K. 257.) When the instructions complained of relate to a degree of crime inferior to the principal offense charged in the information, and inferior to that of which the defendant is convicted, they will be deemed not to have prejudiced. (*State v. Dickson*, 6 K. 209.) “‘Homicide shall be justifiable when committed by any person, . . . in the lawful defense of such person, . . . when there shall be a reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be immediate danger of such design being accomplished.’ By this definition we see, that before a person can take the life of another, it must reasonably appear that his own life must have been in imminent danger, or that he was in imminent danger of some great bodily injury from the hands of the person killed. No one can attack and kill another because he may fear injury at some future time.” In the light of the evidence and the other instructions to the jury, this instruction was not erroneous. (*State v. Rose*, 30 K. 501.)

106. An instruction as to malice sustained, in absence of other instructions and evidence from the record. (*Millar v.*

State, 2 K. 174.) There is no distinction in principle between express and implied malice. (*Craft v. State*, 3 K. 450.) "The jury are further instructed, that the fact alone, by itself, that the deceased was killed by defendant, is not sufficient to establish a malicious intent." In many cases the above instruction would be good law, but in the present case, the instruction would be misleading and erroneous. (*State v. Mahn*, 25 K. 182.) A murder that is committed by means of poison involves and presupposes the element of malice, premeditation, and deliberation, and hence it was needless for the court to state that they are prerequisites to a conviction; (*State v. Baldwin*, 36 K. 1;) and it was not error for the court to say to the jury that, "in common parlance, chloroform is classed among the poisons," when he couples with the statement the direction that it was still necessary for the jury to find from the evidence that chloroform is a poison, before the defendant could be convicted; (*State v. Baldwin*, 36 K. 1;) and it was not error for the court to instruct the jury as to the ordinary meaning and definition of anæsthetic, chloroform, and poison, as given by Webster's dictionary and other works of standard authority, where it appears that the definitions are correct in every respect. (*State v. Baldwin*, 36 K. 1.) In a homicide case, limiting the jury to circumstances of the interview, and excluding considerations of angry feelings, properly refused. (*State v. Kearley*, 26 K. 77.) In an information charging the defendant with murder, the name of the person killed was alleged to be "Bernhart;" and upon the trial his name was given by the different witnesses as "Banhart," "Benhart," "Beanhart" and "Bernhart." *Held*, That an instruction by the court, that a mere difference in the spelling of the name which the deceased bore, and that alleged in the information to have been his name, is immaterial, if the name proved be *idem sonans* with that stated in the information, was not inapplicable or erroneous. (*State v. Witt*, 34 K. 488.)

107. Where the crime is defined, but essential act omitted from definition, but admitted to have been done by the accused, no error; (*State v. Jansen*, 22 K. 498;) and where evidence is

all one way, and proves the fact, the court may instruct the jury to find accordingly. (*State v. Herold*, 9 K. 194.) It was not error to refuse to charge that no offense is charged, and jury must find for defendant in this case. (*Rice v. State*, 3 K. 141.) Where facts are proved beyond all controversy, it is not error for the court to assume in its charge that they exist; (*State v. Mortimer*, 20 K. 93;) and an instruction that every sale of liquor without permit, etc., is unlawful, is not error. (*State v. Drake*, 33 K. 151.) In a murder case, instruction referring to "*this murder*," held improper. (*Horne v. State*, 1 K. 42.) Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury, not warranted by the facts in evidence, is erroneous; and unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside. (*State v. Whitaker*, 35 K. 731.)

108. Where the record contains none of the evidence, upon which special instructions are predicated, we cannot determine their applicability, nor that they were erroneously refused. (*State v. English*, 34 K. 629.) Under an information charging a crime generally, and the verdict of the jury finds the defendant guilty as an accessory before the fact, and the whole testimony is not preserved in the record, it is impossible for this court to say there was error in refusing an instruction which apparently bears solely upon the question of defendant's guilt as a principal; (*State v. Cassady*, 12 K. 550;) and where instructions that are refused are not brought to the supreme court, they will not be passed upon. (*State v. Teissedre*, 30 K. 476.)

109. It is not necessary for a trial court to repeat its instructions to the jury, or to give the substance of the same more than once; and it is not error to refuse to give an instruction which, if given, would be misleading; (*State v. Bailey*, 32 K. 83;) and instructions need not be repeated. (*Craft v. State*, 3 K. 450; *State v. Volmer*, 6 K. 371; *City of Topeka v. Tuttle*, 5 K. 311.) Where the court charges the law correctly, it is not bound to

repeat the charge in a different form. (*Rice v. State*, 3 K. 141.) Where the court refuses instructions as asked for, but gives all that were proper to be given in its general charge, it is not error; (*State v. Peterson*, 38 K. 204;) and it is not error for the court to refuse instructions which might mislead the jury, and particularly so where all the necessary instructions upon the subject are given by the court to the jury. (*State v. Mortimer*, 20 K. 93.) It is ordinarily sufficient if the court in its charge to the jury state once, fully and clearly, the general propositions of law applicable to the case. (*State v. Kearley*, 25 K. 77.) Where an instruction is refused, and other instructions are given which fully embrace the instruction refused, no error is committed. (*State v. Groning*, 33 K. 18.)

110. On a trial for murder, if the defendant relies on a supposed necessity for the killing, as a justification or excuse, the rule to be applied is that the accused must have believed that he was in immediate and actual danger of his life from the deceased, and this belief must rest on reasonable grounds, and the party from whom the danger is apprehended must be making some attempt to execute his design, or at least be in an apparent situation to do so, and thereby induce a reasonable belief that he intends to do so immediately; (*State v. Horne*, 9 K. 119;) and it is not essential that the defendant show that deceased *actually* had a deadly weapon; it is sufficient if he show that the conduct of deceased was such as to induce a reasonable belief that he had one. (*State v. Potter*, 13 K. 414.) If defendant had reasonable grounds to apprehend that he was in imminent danger, he is justified in defending himself. (*State v. Howard*, 14 K. 173.) Upon the trial, where the defense is that the homicide was justifiable, in self defense, the instructions are not erroneous when it clearly appears therefrom that the jury were directed that there shall be reasonable apprehensions of imminent danger, and of the reasonableness of this apprehension the jury are to be the judges, but the threats and circumstances upon which this apprehension rests must not only tend to lead to the belief of such danger, but they must force the belief upon

the mind, and then the belief must be reasonable, and such as reasonable men act on. (*State v. Bohan*, 19 K. 28.) Where one commences an altercation and strikes his adversary with his hand, with no purpose to cause great bodily injury to him, and his adversary repels such assault with a deadly weapon, and after the assailed has shot and wounded the assailant and has retired behind a wall, and the assailant ceases to follow, but has neither retreated nor attempted any abandonment of the conflict, *held*, that the assailant is not justified in defending his own life to the taking of the life of the other, even if the assailed attempts at the time to shoot the assailant. (*State v. Rogers*, 18 K. 78.)

111. The code provides that the court "must charge the jury in writing;" and it is error to omit to do so. (*State v. Huber*, 8 K. 447; *State v. Potter*, 15 K. 302.) Where the bill of exceptions states that some of the instructions were given orally, without stating the language used, the judgment will be reversed; (*State v. Potter*, 15 K. 302;) but the court may make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury, or counsel, or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question of law involved in the trial, or a comment upon the evidence. (*State v. Potter*, 15 K. 302.) Where a juror propounds a question to the court, it may make a direct answer, without reducing the same to writing, provided in so doing it does not make an independent statement of a rule of law. (*State v. Potter*, 15 K. 302.) To receive verdict of guilty and recommending lowest punishment, and giving jury form to sign, not error. (*State v. Potter*, 15 K. 302.) It is immaterial whether the oral charge is given before the jury retire, or after they return to ask further instructions; it is an error. (*State v. Potter*, 15 K. 302.) But where the court, in charging the jury in a criminal case, *reads a section of the statute*, without incorporating the same in its written charge, but merely referring thereto, such failure to incorporate the statute in the written charge will

not authorize a reversal of the judgment. (*State v. Mortimer*, 20 K. 93.)

JEOPARDY.

112. The defendant cannot appeal from ruling sustaining demurrer to plea of *autrefois acquit*, till after trial; (*State v. Horneman*, 16 K. 452;) and where there was a charge of shooting with intent to kill, not a defense to show former trial for maliciously shooting a horse. (*State v. Horneman*, 16 K. 452.) But where a mill and its contents, including the books of the mill, are destroyed by one single fire, and the defendant is prosecuted for setting fire to and burning the mill, and is acquitted, such acquittal is a good defense to a subsequent prosecution for setting fire to and burning the books of account. (*State v. Colgate*, 31 K. 511.) Where there is a joint prosecution for assault and battery on one and assault on another, all occurring at the same time, a judgment as to one is not a bar as to the other. (*City of Olathe v. Thomas*, 26 K. 233.) Where a person charged with having committed a criminal offense breaks jail and escapes, and is thereafter tried upon such charge and acquitted, he cannot set up such acquittal as a bar to an information charging him with the offense of breaking jail and escaping. (*State v. Lewis*, 19 K. 260.) A conviction on plea of guilty is not a bar to another prosecution for a subsequent offense. (*State v. Shafer*, 20 K. 226.)

113. A charge against two for selling liquor, separate conviction of one sustained, though the other had no connection with the sale; (*State v. Sterns*, 28 K. 154;) and a trial for selling liquors is not a bar to prosecution for selling to another party. (*State v. Kuhuke*, 30 K. 462.) Where, after the impaneling of the jury, the trial is terminated without a verdict, through any unavoidable casualty, such as the death of a juror, or a judge, the defendant has not been put in jeopardy. (*In re Scrafford*, 21 K. 735.) Where a trial was commenced at one term, but not finished, nor the verdict of guilty returned until during a suc-

ceeding term, there has been only a mistrial; (*In re Scrafford*, 21 K. 795;) and when the defendant obtained a new trial, he thereby placed himself in the same position as if no trial had been had, and the conviction for manslaughter in the fourth degree was no bar to a subsequent conviction of a higher degree of the offense charged. (*State v. McCord*, 8 K. 232; *State v. Miller*, 35 K. 328.) The defendant, by moving for and obtaining a new trial, has waived his right to subsequently plead former jeopardy. (*State v. Hart*, 33 K. 218.)

114. Where the case is submitted to the court without a jury for decision, and the court finds the defendant not guilty, such finding is conclusive, and cannot be set aside upon appeal. (*City of Olathe v. Adams*, 15 K. 391; *City of Oswego v. Belt*, 16 K. 480.) A *nolle prosequi* of a criminal prosecution entered before the commencement of a trial is no bar to a subsequent prosecution for the same offense; (*State v. Ingram*, 16 K. 14;) and an information filed while the indictment is pending, and the latter *nollied*, not a bar; (*State v. Ingram*, 16 K. 14; *State v. McKinney*, 31 K. 570;) and a plea of *nolle prosequi*, as defense to another prosecution, is bad on demurrer. (*State v. Ingram*, 16 K. 14.) After a new trial is granted on the motion of the defendant in a criminal case, the attorney for the state, with the consent of the court, has the authority to enter a *nolle prosequi* without prejudice to any fresh prosecution; (*State v. Rust*, 31 K. 509;) and where, pending an appeal from justice in the liquor case, an information is filed in the district court for the same offense, and the appealed case was dismissed by the state, one was not a bar to the other. (*State v. Curtis*, 29 K. 384.)

115. After a new trial has been granted on the motion of the defendant in a criminal case, the attorney for the state, with the consent of the court, may enter a *nolle prosequi* without prejudice to a future prosecution, and thereafter the defendant may be put upon his trial and convicted upon a new information charging the identical offense set forth in the prior information;

(*State v. Hart*, 33 K. 218;) and the court takes judicial notice of all prior proceedings in a case, on the hearing of a plea in bar of "once in jeopardy." (*State v. Bowen*, 16 K. 475.) Where the plea is one of former jeopardy, and all that was shown was a prior proceeding in the case, a jury was properly denied on that plea. (*State v. Bowen*, 16 K. 475.) One preliminary examination for a criminal offense is no bar to another preliminary examination for the same offense; nor is it any bar to a full prosecution for such offense, although the defendant may have been discharged on the first preliminary examination. A mere preliminary examination does not put the accused in jeopardy, within the meaning of § 10 of the bill of rights, constitution. (*State v. Jones*, 16 K. 608.) A defendant cannot be put in jeopardy twice for same offense; (*State v. Carmichael*, 3 K. 102;) and where there is a verdict of "not guilty," the supreme court cannot reverse. (*City of Olathe v. Adams*, 15 K. 391; *State v. Crosby*, 17 K. 396.)

JOINDER.

116. The court may exercise some discretion in requiring elections to be made, when offenses are joined; (*State v. Criminals*, 31 K. 376;) and the joinder of felonies must be in different counts; but less stringent rule applies to misdemeanors. (*State v. Goodwin*, 33 K. 538.) Separate misdemeanors of a kindred character may be joined in one information, and tried together, with a separate conviction. (*State v. Chandler*, 31 K. 201; *State v. Schweiter*, 27 K. 499.) Assault and battery on J. F. B. does not include an assault on J. B., although made at same time. (*City of Olathe v. Thomas*, 26 K. 232.) Burglary and larceny may be joined in the same count. (*State v. Brandon*, 7 K. 109.) Where there is a charge against two for selling liquor, a separate conviction of one will be sustained, though the other had no connection with the sale. (*State v. Sterns*, 28 K. 154.) A prosecution for the barter and sale of liquor—a

motion to compel election as to which, and kind of liquor prosecuted for, was properly overruled. (*State v. Schweiter*, 27 K. 499.)

JUDGMENT.

117. Where a satisfaction entered in a bastardy case is procured by fraud, the same is void. (*State v. Young*, 32 K. 292.) The charge of maintenance and education, under the bastardy act, is not a debt in the sense in which that term is used in the provision of the constitution forbidding imprisonment for debt, and the provision in case of default, that he shall be committed to jail until the security is given, is not in conflict with § 16 of art. 2 of the constitution. (*In re Wheeler*, 34 K. 96.) The provision of the constitution, declaring that "no person shall be imprisoned for debt except in cases of fraud," applies only to liabilities arising upon contract; (*In re Wheeler*, 34 Kas. 96;) and security for good behavior may be required by the court on conviction, and the court may commit, till it is given. (*State v. Chandler*, 31 K. 201.) Under an information charging an assault "with intent to kill, with a revolver," and a verdict of guilty as charged, the defendant may be convicted of simple assault and battery, special instructions not having been asked, and the evidence not being preserved; (*State v. Cooper*, 31 K. 505;) and a party may be charged with murder and convicted of assault and battery. (*State v. O'Kane*, 23 K. 244.)

118. Judgment must be regularly pronounced and formally entered in criminal cases to authorize the execution of the sentence. (*State v. Huber*, 8 K. 448.) "Penitentiary" is an English word in common use, to signify a prison or place of punishment, and is so used in the statutes. (*Millar v. State*, 2 K. 174.) In a motion in arrest of a judgment, argued by consent, after resignation of judge had been tendered, the journal entry showing the disposition of the motion signed in Harvey county, and entered in Chase county district court, the decision

being made after resignation, the records cannot be impeached collaterally. (*In re Watson*, 30 K. 753.)

119. The court may under each count sentence the defendant to the full amount of the punishment prescribed by statute for each offense; and where imprisonment is imposed, may adjudge the imprisonment under one count to commence at the termination of the imprisonment under another count; (Crim. Code, § 250; *State v. Carlyle*, 33 K. 716;) and the district court may, until the term ends, revise, correct or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation; (*State v. Hughes*, 35 K. 626;) and the passing of a sentence on the accused, after the verdict of the jury, without any finding of the court, is not error. (*State v. Plowman*, 28 K. 569.) A convict escaping before reaching the penitentiary may be arrested and confined the full term of a sentence without further proceedings. (*Hollon v. Hopkins*, 21 K. 638.) The supreme court cannot order a judgment to be rendered against the prosecuting witness, in a criminal prosecution, where such prosecuting witness has not been brought before the supreme court, and has had no opportunity of being heard before such court. (*State v. Cummerford*, 16 K. 507.)

120. Although it might be a safer practice, where the convict escapes and remains absent until the whole of the time as fixed by the court for his imprisonment or for the execution of his sentence has elapsed, to take such convict again before the court that sentenced him, so that the court might resentence him, or in other words, "order the execution of its former judgment," yet such practice is not necessary; (*Hollon v. Hopkins*, 21 K. 638;) and expiration of time, without imprisonment, is not an execution of the sentence. (*Hollon v. Hopkins*, 21 K. 638.) Before judgment, the defendant must be informed of the verdict, and asked if he has any cause why the judgment should not go. (*State v. Jennings*, 24 K. 643.) Under an information charging crime under two sections, the verdict stating facts under one, a judgment accordingly is not error. (*State v. Fisher*, 8

K. 208.) To convict one of the second offense, under the dram-shop act, a conviction must be had of the first offense. (*State v. Volmer*, 6 K. 379.)

JURISDICTION.

121. Where a complaint in writing is made under oath, presented by a citizen to the judge of the district court, charging an offense limited to \$500 fine, and imprisonment one year, no appeal lies from refusal of the judge to act. (*State v. Forbriger*, 34 K. 1.) A voluntary trial before a judge after resignation recognizes him as judge *pro tem*. (*In re Watson*, 30 K. 755.) The judge of the district court at chambers cannot legally hear and determine a prosecution in the nature of a contempt proceeding for an alleged violation of a peremptory writ of mandamus; (*State v. Stevens*, 40 K. 113;) and the judge of the district court at chambers has no power or authority to review the action of the district court vacating and setting aside an order of arrest. (*In re Suppe*, 33 K. 588.) Where the district court has jurisdiction of a criminal case, its jurisdiction to try such case cannot be taken away by the commencement of proceedings in the probate court for the purpose of having the question determined whether the defendant was sane or insane. (*State v. Gould*, 40 K. 258.) The district court has concurrent jurisdiction with a justice, in liquor cases, where the fine does not exceed \$500, and imprisonment in jail one year. (*State v. Brooks*, 33 K. 708.) District courts have concurrent original jurisdiction with justices of the peace in all cases of misdemeanor in which the fine cannot exceed \$500, and the imprisonment cannot exceed one year, whether a preliminary examination has first been had, or not. (*State v. Watson*, 30 K. 281.)

122. The district court has no jurisdiction of a criminal case removed on petition in error to it from the judgment of a justice of the peace. (*State v. Lofland*, 17 K. 390.) An Indian is amenable to laws of the state for killing another Indian;

(*Hunt v. State*, 4 K. 60;) and the laws of Kansas bind all persons within our territory. (*Hunt v. State*, 4 K. 60.) A justice first acquiring jurisdiction in a preliminary examination cannot compel the production of prisoner by mandamus, the county attorney prosecuting the accused before another justice. (*Evans v. Thomas*, 32 K. 469;) and a party has a right to a trial before the justice, charged with misdemeanor, even if the aggregate of the counts would make the fine exceed the limits of the justice's jurisdiction. (*In re Donnelly*, 30 K. 424.) A justice may try a case, if several counts are added together, and may commit for fines, even if they aggregate over \$500. (*In re Macke*, 31 K. 54.) Where a party is arrested and brought before a justice of the peace, charged with the commission of a misdemeanor of which the justice of the peace and the district court have concurrent original jurisdiction, the defendant has a right to demand a trial before the justice of the peace, and the state has no right to elect to treat the proceeding before the justice of the peace as a mere preliminary examination, and have the party committed for a final trial at the next term of the district court. (*In re Donnelly*, 30 K. 191.)

123. Possession of property in this state, stolen without the state, is the same as theft, and may be tried in any county where such property has been. (*McFarland v. State*, 4 K. 68.) The criminal court of Leavenworth county had the same criminal jurisdiction as district court had (1865). (*Rice v. State*, 3 K. 141.) Under § 14, dramshop act, C. L. 1862, the district court had concurrent jurisdiction with justices. (*State v. Muntz*, 3 K. 383.) A question of the jurisdiction of the court may be presented at any time. (*Rice v. State*, 3 K. 141.) Where an ordinance of a city of the second class provides that when a person is brought before the police judge "to be tried upon the charge of being the keeper of a place where intoxicating liquors are unlawfully kept and stored," and provides a punishment therefor, it is sufficient to give the police judge authority to try him. (*Junction City v. Keefe*, 40 K. 275.) The commencement of the term of court in the adjoining county by the elected

judge thereof suspended or closed the term of another county in the same district. (*In re Millington*, 24 K. 214; *Cox v. State*, 30 K. 202.)

124. The legislature may abolish a township, and when done the officers must go with it. (*In re Hinkle*, 31 K. 712.) The state had jurisdiction to try larceny committed on Fort Leavenworth reservation (changed in 1875); (*Clay v. State*, 4 K. 49;) and the Delaware reserve, as to persons not belonging to that nation, forms part of the counties within which situated. (*Miller v. State*, 2 K. 174.) The state has the right to punish for any offense committed within its limits, unless some law excepts; (*United States v. Stahl*, McC. 206;) but the courts of the United States have no jurisdiction of the crime of murder committed upon the military reservation of Fort Harker, in the state of Kansas. (*United States v. Stahl*, McC. 206.) A white man murdering white man on Indian reservation, the courts of Kansas have jurisdiction. (*United States v. Ward*, McC. 199.) Where the court has jurisdiction only by means of the service of process in this state procured by the illegal arrest of the defendant in another state, the court has no jurisdiction. (*State v. Simmons*, 39 K. 262.)

125. A justice of the peace has no authority outside of his own township to entertain a criminal complaint made under § 36 of the criminal code and issue a warrant thereon for the arrest of the accused; but if he does so act outside of his own township, his proceedings are void; (*A. T. & S. F. Rld. Co. v. Rice*, 36 K. 593;) and where a forged time check is uttered in Missouri, but paid to innocent holder by railroad in this state, the crime is committed in Missouri. (*In re Carr*, 28 K. 1.) The consent of a defendant cannot give to a justice of the peace jurisdiction to hold his court outside the limits of his township; (*Phillips v. Thralls*, 26 K. 780;) and a justice of the peace has no power to hold his court for the final trial of parties charged with criminal offenses outside the limits of the township of which he is justice. (*Phillips v. Thralls*, 26 K. 780.) So a police judge of a city of the second class has no authority to

cause a person charged with an offense against the criminal laws of the state, committed beyond the limits of the corporation, to be examined before him for such an offense, or to commit him to jail therefor, or to hold him by bail for trial before the district court. (*State v. Davis*, 26 K. 205.) An objection that county attached for judicial purposes should try the case properly overruled, there being no evidence of the organization of that county. (*State v. Ruth*, 21 K. 583.) Where a change of venue is granted in a criminal case, and the proceedings are so irregular as to be wholly void, the question of jurisdiction may then be raised for the first time in the supreme court on appeal; but where the proceedings of the court granting the change of venue are not so irregular as to be wholly void, the question as to the regularity of such proceedings must be raised at the earliest opportunity; (*State v. Potter*, 16 K. 80;) but an unauthorized appearance for the state, in supreme court, does not give jurisdiction. (*McGilvray v. State*, 19 K. 479.)

JURY.

126. Where the jury is discharged in the absence of the defendant for failing to agree, it does not entitle accused to release. (*State v. White*, 19 K. 445.) The mere fact that the record fails to show that one of the petit jurors, who was duly sworn and tried the case, was summoned or selected from the bystanders, ought not to vitiate the verdict, the record showing that the whole twelve were good and lawful men of the body of the county, and failing to show that the defendant was prejudiced by the omission. (*Montgomery v. State*, 3 K. 264.) Although the trial court may err in overruling a question propounded to a juror upon his *voir dire*, yet it will not be sufficient to justify a reversal unless the defendant challenged the juror either for cause or peremptorily, or exhausted his challenges. (*State v. Furbeck*, 29 K. 532.) Where the court erred in overruling a challenge to persons sworn on their *voir dire* as

jurors, and where the same persons are afterwards challenged peremptorily and rejected from the jury, the judgment of the court below will not be reversed, unless the record shows that the defendant had exhausted his peremptory challenges. (*Morton v. State*, 1 K. 468.) Where an information in separate counts states separate misdemeanors of a kindred character, against the same person, the defendant is entitled, upon the trial, under the information, to four peremptory challenges, and no more. (Crim. Code, § 198.) (*State v. Skinner*, 34 K. 256.) The trial court established a rule that the state should exercise one of its peremptory challenges, and then the defendant should exercise two of his peremptory challenges, and so on, alternately, until all the peremptory challenges, given by law to the parties, should be exhausted. The court did not err in establishing such rule; and as the defendant waived the eighth, ninth, tenth, eleventh and twelfth of his peremptory challenges, error would be immaterial. (*State v. Bailey*, 32 K. 83.) The defendant having exhausted all his peremptory challenges, the error in retaining a juror who had formed an opinion will be material; (*State v. Brown*, 15 K. 400;) yet where the court erred in overruling challenge by appellant for cause to person sworn on his *voir dire* as a juror, but the court excused such challenged juror before any other juror was examined, and before any juror was challenged peremptorily by the defendant, the overruling the challenge to the juror did not affect the substantial rights of the defendant. (*State v. Drake*, 33 K. 151.)

127. The fact that two jurors were not electors was not an absolute disqualification, but only a ground for challenge; their disqualification would have been a proper ground for discharging them from the jury before they were sworn, but is not a sufficient ground for granting the defendant a new trial. (*State v. Jackson*, 27 K. 581.) Where a motion for a new trial in a criminal case is made upon the ground that one of the jurors did not reside six months in the state, and therefore was not an elector or a qualified juror, and the affidavits in support of the motion simply show the fact of such disqualification, and

that it was unknown to the defendant until after the verdict, and it does not appear from the record that any preliminary examination was made of the juror as to his qualifications, or that he made any false statements with respect thereto, or that any fraud or imposition was practiced upon the defendant, or even that the defendant's counsel was, at the time of impaneling the jury, ignorant of such disqualification, *held*, no error to overrule the motion. (*State v. Hinkle*, 27 K. 308.) Where two defendants are jointly charged in one information with a misdemeanor, and, being refused a separation, are put on trial together, each is entitled to the same number of peremptory challenges he would be entitled to if tried separately; (*State v. Durein*, 29 K. 688;) but the error in *voir dire* examination of juror is immaterial, if the party did not challenge the juror, or make any peremptory challenges. (*State v. Furbeck*, 29 K. 533.) The mind of the court must be satisfied that the challenged juror is free from bias; (*Morton v. State*, 1 K. 468;) but having an opinion, and having no doubt as to the correctness of it, he is an incompetent juror. (*State v. Miller*, 29 K. 43.) Where a juror swears on his *voir dire* that he has heard a detailed statement of the circumstances which he remembered, but that he had not formed nor expressed an opinion, he was not disqualified to sit as a juror. (*Roy v. State*, 2 K. 405.)

128. Impressions not amounting to opinions, received from newspaper articles or rumor, do not disqualify a juror, and are not cause for challenge. (*State v. Medlicott*, 9 K. 257, cited and followed.) (*State v. Cracford*, 11 K. 32.) Certain jurors testified on their *voir dire* that they had formed opinions thereon; but it appearing from the whole of their examinations that such opinions were not settled, or fixed, and that they could give full and fair consideration to all the testimony and be guided solely by it in their conclusions, it is held that the challenges were properly overruled. (*State v. Spaulding*, 24 K. 1.) A juror on his *voir dire* testified that he had neither formed nor expressed any opinion, and was without bias or prejudice. Two witnesses testified that they had heard him say that he was

afraid defendant had got himself into a bad scrape; that he had got his foot into it, or words to that effect. On a motion for a new trial, several witnesses testified that at different times they had heard similar statements. The juror denied making any such statements; asserted as to some of the witnesses that he was not on speaking terms with them, and had not been at the place named by them as the scenes of these conversations. The trial judge sustained the qualification of the juror. A new trial will not be granted because of this juror. (*State v. Bancroft*, 22 K. 170.) One of the jurors stated that he was convinced that the deceased was dead and that the defendant had killed him, and that it would require a great deal of evidence to remove this conviction. It appeared from the questions asked by the defendant's counsel to other jurors before this challenge was overruled, that the death of the deceased and the killing of him by the defendant were conceded, and the defendant's counsel stated to the jury that it would appear from the evidence that the defendant had killed the deceased, but that it would be shown that the killing was done in self defense. The trial court did not commit any material or substantial error in overruling the defendant's challenge of the juror for cause. (*State v. Wells*, 28 K. 321.) One of the jurors, upon an examination as to his competency, stated "that he had formed the opinion that P. was killed, and that B. killed him," and nothing further was shown with reference to the competency of said juror; and the defendant then challenged said juror for cause, and the court overruled the challenge. The court erred. (*State v. Brown*, 15 K. 400.)

129. The bill of rights, which provides a speedy public trial by an impartial jury, applies only to criminal prosecutions for violations of the laws of the state; not to prosecutions for violations of ordinary city ordinances. (*State v. City of Topeka*, 36 K. 76.) A summary trial without a jury in a criminal case, in city court, can only be had where the right of appeal to a court with jury exists. (*In re Rolfs*, 30 K. 758.) It is within the discretion of the court having jurisdiction to excuse persons summoned

upon juries from serving in any particular case, upon application being made for such excuse; (*State v. Dickson*, 6 K. 209;) but excusing juror is not ground for reversal, if good jury obtained. (*State v. McKinney*, 31 K. 570.) The record failing to show that the substantial rights of the parties have been affected, the jury having been composed of good and lawful men, the same that might have been selected had the order been according to law, the supreme court will not interfere; the indictment held sufficient to sustain the judgment. (*Montgomery v. State*, 3 K. 264.) The record showing affirmatively that the indictment was returned into court by the grand jury, sufficient; (*Millar v. State*, 2 K. 174;) and indorsed "true bill," and signed by foreman, shows concurrence of requisite number. (*Laurent v. State*, 1 K. 313.) The absence of any member of the grand jury on account of sickness, or any other cause, will not prevent the other members of the grand jury from finding and returning indictments, provided, of course, there are twelve members left to transact business; but no indictment can be found without the concurrence of at least twelve grand jurors. (*State v. Copp*, 34 K. 522.)

130. While a grand jury should only be called by order of the district court, yet when one has been called by order of the judge in vacation, and has been impaneled, charged and sworn by the court, it is *de facto* grand jury. (*State v. Marsh*, 13 K. 596.) The statute has provided (ch. 119, Comp. Laws, §§ 24, 25) two methods by which a grand jury may be filled to the required number by the district court, when for any cause a sufficient number shall not be present and answer on the calling of the panel. It is error in such case for the court below to order persons to be transferred from those duly served and returned as petit jurors to the grand jury, and to order other persons to be selected from the bystanders to complete the panel of the grand jury. But, held, that the criminal code does not allow a defendant, after conviction, for the first time, to raise the objections, but to be available they must be raised before pleading to the merits. (*Montgomery v. State*, 3 K. 264.) No plea

in abatement taken to any grand jury duly charged and sworn, for any irregularity in their selection, will be sustained, unless it be one that implies corruption. (*State v. Skinner*, 34 K. 256.) That the grand jury that found the indictment, under which the defendant is arraigned was properly constituted, is not a ground for a new trial, nor for an arrest of judgment under the criminal code. A motion to quash, plea in abatement or other dilatory plea would be the proper manner of raising the question. (*Montgomery v. State*, 3 K. 264.) In case any grand juror fails to attend or is discharged, his place shall be filled by a talesman. The talesman is to be selected in the discretion of the sheriff. The supreme court is not to assume that the district judge acted from any wrong or improper motive in naming the talesmen. (*State v. Copp*, 34 K. 522.)

131. Where in a murder case neither the defendant nor his wife testified, and after the verdict had been agreed upon, signed by the foreman and placed in a sealed envelope, and while the jury were waiting to be called into the court room, there was some conversation between them as to the fact that his wife did not testify, and that if certain facts bearing strongly against the defendant were not true, she could have contradicted or explained them, there was no error in refusing to set aside the verdict; (*State v. McKinney*, 31 K. 570;) and the statement of the juror in jury room, that he believed the defendant innocent, not sufficient to impeach verdict of guilty. (*State v. Furbeck*, 29 K. 533.) Where it is shown that pending the trial and during the recess of the court one of the jurors was in a company, one of whom stated that defendant had been previously guilty of a like crime, but it is doubtful whether the juror heard the statement, and it does not appear to have been made by one interested in the prosecution or seeking to influence any juror, and the testimony is amply sufficient to sustain the verdict, and the motion is overruled, this court will not set aside the conviction. (*State v. Yordi*, 30 K. 221.) A verdict will be set aside where the bailiff, a witness for prosecution, was with the jury while they were deliberating. (*State v. Snyder*, 20 K. 306.)

Where the bailiff enters the jury room during the deliberation of the jury on their verdict, and reads to them portions of the instructions, such misconduct demands the annulment of the verdict. (*State v. Brown*, 22 K. 222.) After the jury have retired to consider of their verdict, it is misconduct for a bailiff to enter the jury room while the jury are in session. It is also misconduct for the jury to separate after retiring to consider of their verdict and before rendering their verdict. (*State v. Bailey*, 32 K. 83.) A justice of the peace, acting judicially and within the scope of his jurisdiction, does not render himself liable to an action by trying a misdemeanor before a jury of six instead of before a jury of twelve men. (*Clark v. Spicer*, 6 K. 440.) Misconduct of a juror, which does not prejudice the defendant, will not of itself justify reversing a judgment of conviction. (*State v. Dickson*, 6 K. 209.)

132. Where it is claimed that there was misconduct on the part of one or more jurors, a new trial should not be granted where it did not prejudice any of the substantial rights of the defendant. (*State v. Gould*, 40 K. 228.) When the opportunity for improper influences, prejudicial to the accused, or in his favor, is afforded, if the verdict is against the accused, he is entitled to the presumption that the irregularity has been prejudicial to him, and it is incumbent on the state to show that no such injury could have occurred by reason of the irregularity. (*Mudden v. State*, 1 K. 341.) The inattention of a portion of the jury with respect to the instructions of the court is not ground for a new trial; and the affidavit of a juror that he did not hear certain instructions will not be received; (*State v. Dickson*, 6 K. 209;) and the fact that some of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial when it is not shown that the jurors read any part of what was written in such transcript. (*State v. Miller*, 35 K. 328.) The statements attached to an information were read and considered by the jury during their deliberation. This was error for which a new trial should be granted. And the fact

that the jurors read and considered the foregoing statements during their deliberations may be shown by the testimony of the jurors themselves. (*State v. Clark*, 34 K. 289.) If the jury carry with them on retiring to consider of their verdict a paper having writing thereon, accidentally with the instructions in the case, and it is not shown that it has produced any improper influence on the jury, nor that it could have influenced the finding of the jury, nor prejudiced the rights of the defendant, a new trial will not be granted. (*State v. Taylor*, 20 K. 643.)

133. Where the question submitted to the district court upon a motion for a new trial was the alleged intoxication of a member of the jury while the case was on trial, and upon which there was competent but conflicting oral testimony, the finding of the trial court thereon will be accepted as controlling in this court. (*State v. Tatlow*, 34 K. 80.) The mere drinking of intoxicating liquors by a juror during the progress of the trial, unless it is furnished to him by the prevailing party, is not of itself sufficient to set aside the verdict; and the fact that the juror was under the influence of intoxicating liquor during the recess of the court, but had recovered therefrom before the trial was resumed, while it is improper conduct, to be severely condemned, will not overturn the verdict unless there is reason to believe that the misconduct in some way influenced the verdict. (*State v. Tatlow*, 34 K. 80.) It is also misconduct for them to eat anything during such time, except with the express permission of the court; and where such misconduct is shown on the part of the bailiff or jury, it then devolves upon the prosecution to show that nothing transpired which could in the least have influenced any member of the jury adversely to the interest of the defendant. Although there was misconduct, the defendant is not entitled to a new trial. (*State v. Bailey*, 32 K. 83.) Where the trial in a criminal case is stopped by a death, of juror or judge, the defendant may be tried again. (*In re Scrafford*, 21 K. 735.)

134. Where a party desires to avail himself of irregularity in administering the oath to the jury, the attention of the court

should be called to it at the time the oath is taken; (*State v. Baldwin*, 36 K. 1;) and it is no part of the duty of the clerk to place on the record the formulary of words in which the oath is couched. (*State v. Baldwin*, 36 K. 1.)

135. The court has almost unlimited discretion in discharging persons summoned on jury; (*State v. Miller*, 29 K. 43;) and the panel may be filled, if the requisite number fail to appear. (*Trembly v. State*, 20 K. 116.) While under § 5 of ch. 104 of the Laws of 1876, a court should require the attendance of a regular panel of at least twelve jurors, yet, if by legitimate and proper excuse that panel be reduced slightly below that number, the court is not compelled to delay the trial of any case until the requisite machinery can be set in motion and made effective for drawing and summoning the deficient number, but may proceed under § 6 of said act to supply the requisite jurors; and the court naming jurors to fill the panel, need not examine the assessment roll. (*Trembly v. State*, 20 K. 116.) Where twenty-six persons are summoned to appear as the regular panel of petit jurors, and it is shown that two or three of the panel are not eligible to be returned on the jury list, the court has ample power to purge the jury without sustaining a challenge to the array. (*Rld. Co. v. Davis*, 34 K. 204; *State v. Whisner*, 35 K. 271.) Where a challenge to the array or panel of petit jurors is sustained, there need be no delay on the part of the court in summoning, under the provisions of the statute, a sufficient number of persons properly qualified to act as jurors in any case; (*Trembly v. State*, 20 K. 116; *State v. Skinner*, 34 K. 256;) and where a challenge to an array of jurors is sustained on account of some irregularity in the drawing, it is no ground of challenge to a juror, that he was one of an array which had been successfully challenged as above. (*State v. Yordi*, 30 K. 221.) Where the statute specifically prescribes the class or list of persons from which the jurors are to be selected, the failure on the part of the officers to draw the jurors from the class or list prescribed is a sufficient ground to sustain a challenge to the array. (*State v. Jenkins*, 32 K. 477.)

136. A jury was regularly drawn and summoned to the February term of the Butler county district court. Thereafter, on February 6, a law took effect creating the eighteenth judicial district, and assigning Butler county to that district. The first term fixed by that law thereafter commenced on the first Tuesday of May. Without any new drawing or summoning, the jury above named appeared at the May term. The act creating the eighteenth district provided, among other things, that all proceedings of every kind and character, pending in any of the courts of the counties named in the law, should stand, be returnable and triable at the first term of the court for said counties, the same as if the change therein contemplated had not been made. *Held*, That a challenge to the array was properly overruled. (*State v. McKinney*, 31 K. 570. The mere fact that a deputy sheriff was present at the county clerk's office to attend and witness the drawing of a jury, and after such drawing signed the certificate of the drawing with the county clerk and the two justices of the peace of the county, who also attended such drawing, in accordance with the act for the selection of jurors, where the names of all the jurors were drawn from the jury box by such county clerk in the presence of all of such parties, furnishes no cause to discharge or set aside the jurors so drawn. (*State v. Bohan*, 19 K. 28.) A failure to give three days' notice to the sheriff and two justices of the peace will not vitiate the drawing of jurors, if at the time of such drawing the sheriff and two justices are in fact present. (*State v. Yordi*, 30 K. 221.) In a plea of former jeopardy, all that was shown was a prior proceeding in the case; jury was properly denied on that plea; (*State v. Bowen*, 16 K. 475;) and where there is an issue on plea of *autrefois acquit*, evidence of *nolle prosequi*, jury refused on that issue, not error. (*State v. Ingram*, 16 K. 14.) A trial without a jury in police court, with right of appeal to court having jury, is not unconstitutional. (*City of Emporia v. Volmer*, 12 K. 622.)

137. Where the polling of jury is refused, a new trial will be granted. (*State v. Muir*, 32 K. 481.) The jury are the exclusive judges of all questions of fact. (*Horne v. State*, 1 K.

42.) Question whether a jury should disregard all the evidence of a corrupt witness should be left to them, but error is waived by not excepting. (*State v. Potter*, 16 K. 80.) When a jury decides a question right, that ought to have been decided by the court, no error. (*State v. Lewis*, 10 K. 157.) Whether biters, cordials, tonics, etc., are intoxicating, is a question for the jury. (*Intoxicating Liquor Cases*, 25 K. 751.) The question whether a wife acted under the coercion of her husband or not is a question of fact which should in all cases be left to the jury. (*State v. Hendricks*, 32 K. 559.) In a prosecution for larceny, the jury may act on admission of recent possession, and exclude reasons given and explanation. (*State v. Stewart*, 24 K. 250.) A record may be corrected, showing the correct number of jurors, after the case is in the supreme court. (*State v. McAnulty*, 26 K. 533.)

138. The court may permit a separation of the jury at any time before the jury are allowed to retire under the charge of their bailiff for final deliberation upon their verdict; (*State v. Hendricks*, 32 K. 559;) but the law does not prohibit a separation of the jury, with proper admonition by the court, before the case is submitted to them. (*Lewis v. State*, 4 K. 296.) If the jury is allowed to separate after case submitted, it is ground for new trial. (*Madden v. State*, 1 K. 340.) A court, at every separation of a jury and at each adjournment in a criminal trial, should give the statutory admonition; but where, before any separation of the jury was had, the court had given this admonition, and had stated to the jury that the duty thus declared rested upon them whenever out of the jury box, until the close of the trial, and that the admonition was duly given at each adjournment thereafter, the judgment will not be reversed simply because several recesses of from three to five minutes' duration are shown to have taken place without this admonition being given as preliminary thereto. (*State v. Stackhouse*, 24 K. 445.)

139. It is not essential that the admonition to be given to the jury at the time of each adjournment be in the very language of the statute; (*State v. McKinney*, 31 K. 570;) but where the

court allows the jury to separate, and fails to admonish them as required by law, it will be presumed, in the absence of anything to the contrary, that the rights of the defendant were prejudiced during said separation because of such failure; and *held*, that the burden of proving that the rights of the defendant were not so prejudiced, rests upon the prosecution. (*State v. Mulkins*, 18 K. 16.) Where the court permits the jury to separate during an adjournment, but fails to admonish them, and it was not shown that nothing transpired during such separation to prejudice the rights of the defendant, but evidence was introduced tending to show that the rights of the defendant may have been prejudiced by conversation had during said separation, the court erred in overruling a motion for a new trial. (*State v. Mulkins*, 18 K. 16.) That a juror was used in court as a witness in another case, pending deliberation, is not a ground for new trial. (*State v. Adams*, 20 K. 311.)

140. The viewing the premises without objection of defendant is not ground for new trial, as depriving him of right of being present at the trial; (*State v. Adams*, 20 K. 311;) and the court may send the jury to examine place where any material fact occurred. (*State v. Furbeck*, 29 K. 535.) The right to trial by a jury of "county" may be waived. (*State v. Potter*, 16 K. 80.) Where upon a charge of assault with intent to kill, the testimony runs in two lines, one tending strongly to prove the full crime charged, and the other to prove an *alibi*, and that the defendant was innocent of any offense, and where it appears that for a long time the jury were unable to agree, and that after having been unable to agree for many hours they are brought into court, and the duty of agreement is strongly urged upon them by the court, who intimates, that it would be a reflection on them not to agree—that there should be concession in matters of detail and minor importance—that they should bring their minds together as an apothecary mixes different ingredients and ascertains the product, and that they need not hope to be discharged for a long time; and where the whole tendency of this instruction is to impress too strongly upon the jury the

duty and necessity of coming to some agreement, and thereafter the jury return a verdict of guilty of an assault only, *held*, that such verdict ought not to be permitted to stand; that it is too apparently a compromise between those believing defendant guilty of the crime of assault with intent to kill, and those believing him guiltless of any offense, induced wholly or in part by the urgent instructions of the court upon the duty of agreement. (*State v. Bybee*, 17 K. 462.) Where a defendant in a criminal prosecution has been found guilty by the jury, and the defendant to support his motion for a new trial offers to prove by the testimony of the foreman of the jury that he, the foreman, was "misled by the form of the verdict, and would not have signed it had he known its real meaning," and the court refuses to permit such testimony to be introduced, *held*, not error. (*State v. Burwell*, 34 K. 312.) The affidavits of jurors are seldom received to impeach verdict. (*State v. Furbeck*, 29 K. 533.)

LIMITATION.

141. Imprisonment in the state penitentiary does not fall within any of the exceptions of the limitations upon criminal prosecutions; and therefore the time of imprisonment of the accused within the state which passes before a prosecution is begun cannot be excluded from the statutory period of limitation; (*In re Griffith*, 35 K. 377;) and the mere filing of a complaint before a magistrate charging the commission of a felony, upon which no warrant is issued nor arrest made, is not such a commencement of the prosecution as will take the case out of the operation of the statute of limitations. (*In re Griffith*, 35 K. 377.)

MOTION.

142. On the hearing of a motion, the court is not compelled to receive affidavits alone. (*State v. Stackhouse*, 24 K. 445.) To question the sufficiency of indictment, is by motion to quash before verdict, and motion in arrest of judgment after verdict, but not by moving to exclude testimony. (*Rice v. State*, 3 K. 141.)

NEW TRIAL.

143. No notice is required to be given of a motion for a new trial. (*Werner v. Edmiston*, 24 K. 147.) The finding of the court upon the question of fact presented in a motion for a new trial, which is made upon oral and conflicting testimony, is as conclusive upon this court as the verdict of a jury founded on like testimony, and which has received the approval of the trial court. (*State v. Baldwin*, 36 K. 1.) Where the testimony offered by the state, alone, is sufficient to sustain the prosecution, a verdict will not be set aside in the supreme court for insufficiency of the evidence; (*Stite v. Smith*, 35 K. 618;) and a new trial granted on the motion of the defendant places the party accused in the same position as if no trial had been had; (*State v. McCord*, 8 K. 232;) and a defendant obtaining new trial by reason of defect in information, waives right to plead former jeopardy. (*State v. Hart*, 33 K. 218.) A new trial will be refused when ground is that one of the jurors was not a citizen of Kansas; objection made too late. (*State v. Hinkle*, 27 K. 308.)

144. New trial granted on account of argument of attorney. (*State v. Balch*, 31 K. 465; *City of Topeka v. Myers*, 34 K. 500.) A new trial will not be granted on account of argument of attorney. (*State v. Mortimer*, 20 K. 93; *State v. Mosley*, 31 K. 355; *State v. McCool*, 34 K. 613; *Winter v. Sass*, 19 K. 556.) As a general rule, newly-discovered evidence merely cumulative is no ground for a new trial. (*Clark v. Norman*, 24 K. 515; *State v. Rohrer*, 34 K. 427; *State v. McCool*, 34 K. 613.) Where newly-discovered testimony runs simply to the matter of threats, and only tends to make more emphatic and clear what is already plain by the testimony, the court did not err in refusing a new trial on this ground. (*State v. Kearley*, 26 K. 77.) A new trial in a criminal case was asked upon the ground of newly-discovered evidence. As the evidence was not discovered since the trial, it cannot be regarded as newly discovered, and the non-attendance

of the witness, who was served with process, is not sufficient ground for a new trial where no continuance was asked on account of his absence. (*State v. McCool*, 34 K. 613.) As a general rule, newly-discovered evidence, the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. (*State v. Smith*, 35 K. 618.)

145. The declarations of a party other than the defendant, that he committed the offense charged, are not admissible in evidence in behalf of the defendant, and an application for a new trial based on such evidence was properly refused. Evidence examined, and held to be sufficient to sustain a charge of assault. (*State v. Smith*, 35 K. 618.) Newly-discovered evidence of hostility to the defendant in a criminal action, on the part of a witness whose testimony was used against the defendant at the trial, is not a cause for a new trial. (*State v. Rohrer*, 34 K. 427.) Where a motion for a new trial is made on the ground of newly-discovered evidence, it is, as a general rule, essential that the affidavits of the newly-discovered witnesses should be produced, or their absence accounted for. (*State v. Kellerman*, 14 K. 135.) Where a party in apparent good health is assailed, his body pierced with three bullet wounds, and he thereupon falls to the ground and dies within thirty minutes, a new trial was properly refused when sought on the ground that certain competent physicians had been found who would testify that none of the wounds described was necessarily fatal. (*State v. Kearley*, 26 K. 77.) In a motion for new trial, upon the ground that verdict is not sustained by sufficient evidence, and the district judge declines to look into the evidence or pass upon its sufficiency, and then overrules the motion *pro forma*, the judgment must be reversed and a new trial granted. (*State v. Bridges*, 29 K. 138.) The supreme court will, in reviewing the ruling of the district court on a motion for a new trial, presume that the controverted facts with reference to improper statements by prosecuting attorney were in accordance with that portion of conflicting evidence which is most in consonance with

the ruling of the court below. (*State v. Comstock*, 20 K. 650.) If the misconduct of jury and bailiff does not prejudice accused, a new trial will not be granted. (*State v. Bailey*, 32 K. 83; *State v. McKinney*, 31 K. 570; *State v. Yordi*, 30 K. 221; *State v. Taylor*, 20 K. 643; *State v. Dickson*, 6 K. 209.)

OBJECTION.

146. An objection to evidence must specify the grounds; (*Rheinhardt v. State*, 14 K. 318;) and must be first made in district court. (*State v. Ingram*, 16 K. 14.) To be available, it should run to the specific testimony alone, which is objectionable. (*State v. Cole*, 22 K. 474.) An objection to evidence is proper when information is not signed by prosecuting attorney. (*State v. Jackson*, 4 K. 150.)

PLEA.

147. A plea in abatement is a dilatory plea, and must be pleaded with strict exactness; it must be certain to every intent; (*State v. Skinner*, 34 K. 256;) but all legal defenses may be given under a plea of "not guilty." (*Territory v. Reyburn*, McC. 134.) Perjury may be made without plea being entered in the case. (*State v. Lewis*, 10 K. 157.)

PRELIMINARY EXAMINATION.

148. An information need not show that there has been a preliminary examination. (*State v. Finley*, 6 K. 366.) An information need not state a waiver of preliminary examination, but the question may be raised by plea. (*State v. Barnett*, 3 K. 250.) A party may be held over, on a charge differing from warrant or complaint, but a new complaint ought to be filed. (*Redmond v. State*, 12 K. 172.) While an indictment was pending, a preliminary examination was held, and an information

filed, based upon such preliminary examination and charging the same offense. The first day of the ensuing term of the district court, the indictment was *nollied*. Thereafter the defendant plead in abatement the pendency of the indictment at the time of the preliminary examination and the filing of the information. The plea was properly overruled. (*State v. McKinney*, 31 K. 570.) A preliminary examination is not a bar to further prosecution. (*State v. Jones*, 16 K. 608.) Where there is a preliminary examination for embezzlement, *as city clerk*, and an information for *clerk, agent, servant*, a special plea of no preliminary examination will be overruled. (*State v. Spaulding*, 24 K. 1.)

149. When there is a charge of felony, a conviction of misdemeanor, and a plea that no preliminary examination was had is overruled, it is not error. (*State v. Watson*, 30 K. 281. Where the accused was charged before the examining magistrate with embezzling the funds of the county of Leavenworth, and in the information was charged with embezzling divers designated funds in the treasury of the county of Leavenworth, and a special plea was interposed that the defendant did not have a preliminary examination as to the embezzlement of any money or other thing belonging to any other person than the county of Leavenworth, nor did he waive his right, the plea was not a bar to the further prosecution of the action under the information. (*State v. Smith*, 13 K. 274; *State v. Spaulding*, 24 K. 1.) Where a defendant, charged with murder in the first degree, waives a preliminary examination for such offense, he not only waives his right to be let to bail, but also to have the facts of the alleged offense examined into on *habeas corpus*; but where said waiver is made under fear of personal violence, he will not be estopped by reason of such waiver. (*In re Malison*, 36 K. 725.) A plea in abatement to an information filed in the district court charging the accused with a criminal offense, grounded upon such fact, claiming that the waiver of preliminary examination was made under duress because handcuffed, is not good, and a demurrer thereto is rightfully sustained.

(*State v. Lewis*, 19 K. 260.) An order by a magistrate, committing persons charged with an offense for trial in a county other than where the offense was committed, is erroneous, but where they have been given a proper preliminary examination, the erroneous order holding them for trial in the wrong county will not invalidate such preliminary examination, nor prevent the filing of an information thereon in the proper county. (*In re Schurman*, 40 K. 533.)

150. It is not necessary that the papers and proceedings on the preliminary examination should be technically regular and exact, like the papers and proceedings required on the final trial. It is not necessary that the papers and proceedings on the preliminary examination should set forth the offense in all its details, and with perfect and exhaustive accuracy. (*State v. Bailey*, 32 K. 83.) Handcuffs held, of themselves, not to be duress, in waiver of preliminary examination. (*State v. Lewis*, 19 K. 261.)

RECOGNIZANCE.

151. A recognizance is not void as to surety, although it is not signed by the principal. (*Tillson v. State*, 29 K. 452.) The description in a recognizance is not void as to surety, not stating the offense; (*Tillson v. State*, 29 K. 452;) and one in form of a penal bond, not signed by principal, containing only initials of his Christian name, held binding on surety. (*Ingram v. State*, 10 K. 630.) When the clerk, at the time the warrant was issued, indorsed thereon that the judge was absent from the county, and fixed the amount of bail required, it was a mere irregularity of the clerk of which the accused cannot complain. (*In re Eddy*, 40 K. 592.) A recognizance given under § 5 of the act relating to illegitimate children is complied with when, after a verdict of guilty, on the failure of the defendant to give the bond, he is taken to the county jail and confined there in pursuance to the order of the court; (*Wheeler v. State*, 39 K.

163;) and a recognizance given under § 5 of ch. 47, Comp. Laws 1879, conditioned that defendant appear at the next term of the district court to answer the complaint, and not depart without leave, and abide the judgment and orders of such court, is not satisfied when the defendant appears at the court and remains in attendance during the trial, but requires that he comply with and perform the judgment that shall be rendered against him. (*Jackson v. State*, 30 K. 88.) Under § 5, ch. 47, Gen. Stat., the words in the recognizance, "abide the judgment and orders," mean that when such judgment is rendered he will surrender himself into the custody of the court, ready and willing, as required by § 13 of the act, to secure the payment of the judgment, or in default thereof to be committed to jail until such security be given. (*McGarry v. State*, 37 K. 9; *Sowers v. State*, 37 K. 209.)

152. In an action on a forfeited recognizance for continuance, petition need not allege prior arrest, examination or waiver; (*Jennings v. State*, 13 K. 80;) and an action may be maintained against surety alone on a recognizance. (*Swerdsfeger v. State*, 21 K. 475.) An action on a forfeited recognizance can only be brought after the adjournment of the term when forfeited; (*Morehead v. State*, 20 K. 636;) but it must appear accused was discharged. (*State v. Crissy*, 18 K. 210.) And such action may be maintained, although the governor may have pardoned the defendant after sentence in the criminal action, and before final judgment on the forfeited recognizance. (*Weathercox v. State*, 17 K. 427.) Where the principal fails to appear at court as required by a criminal recognizance, the failure to call the sureties, or to enter the default of the principal on the records, will not defeat an action brought on the recognizance. (*Ingram v. State*, 10 K. 630.)

153. In a suit against G. W. Barkley, evidence that the defendant on recognizance bond appeared as G. W. Barkley and George W. Barkley, and forfeiture by George Barkley, not material. (*Barkley v. State*, 15 K. 99.) Where a defendant in a criminal action enters into a bond before an examining magis-

trate to appear at the district court, the conditions of the bond are not complied with, if he merely appears at court and departs the same without leave before trial or judgment. (*Glasgow v. State*, 41 K. 333.) Where a recognizance requires a defendant to appear "at the next term of the district court," the defendant is bound to appear on some day during the said next term, and when he does so appear he is bound to remain until permitted to leave by order of the court. (*State v. Gay*, 7 K. 394.) A general denial to suit on recognizance puts in issue default of principal, when not alleged to be of record; and the execution of recognizance must be denied by affidavit. (*Ingram v. State*, 10 K. 630.) A surety is liable on a forfeited recognizance, although it was signed by him when it was incomplete, where the blanks are afterward filled up and the instrument completed and delivered in his presence and under his direction. (*Madden v. State*, 35 K. 146.)

154. When a defendant is arrested and brought before a court, and at his own suggestion enters into a recognizance for his appearance at a subsequent time, he waives all irregularities of the warrant and arrest. (*Junction City v. Keefe*, 40 K. 275.) No action will lie on a druggist's liquor bond, if he pays the fine and costs adjudged against him; (*State v. Estabrook*, 29 K. 739;) and a recognizance will be held valid, the proceedings before the justice not showing the venue of crime. (*Redmond v. State*, 12 K. 172.) A recognizance requiring prisoner to appear before *circuit* court of a county is void; (*Sherman v. State*, 4 K. 570;) and one taken before clerk of district court is void, and cannot be used in evidence; (*Morrow v. State*, 5 K. 563;) and taken by justice in embezzlement case, failing to state value, jurisdiction will be presumed. (*McLaughlin v. State*, 10 K. 581. The recognizance may be taken by sheriff, having custody of prisoner in felony case, the bail being determined. (*Bloss v. State*, 11 K. 462.)

155. Where the recognizance is taken before a notary, but approved by sheriff, an action on the same will sustained. (*State v. Kurtz*, 27 K. 223.) The recognizance having been accepted

and approved with the understanding of the parties that by reason thereof the accused was to be discharged, such bond is not invalid or void on the ground that the defendant was not legally in custody at the time it was given and accepted. (*State v. Terrell*, 29 K. 563.) Where the description of court is too full, it will not vitiate the recognizance; (*Jennings v. State*, 13 K. 80;) and a recognizance not recorded will not defeat a recovery; (*Jennings v. State*, 13 K. 80;) and an attorney may be bound by a recognizance as surety. (*Sherman v. State*, 4 K. 570.) A minor who is a defendant in a criminal proceeding may bind himself personally by a recognizance, entered into by himself and sureties, for his personal appearance at the next term of the district court to answer to a charge for committing a criminal offense. Under our statutes, a recognizance may be held and treated as a contract. (*State v. Weatherwax*, 12 K. 463.)

156. A recognizance is not a contract; it is an acknowledgment of record; (*Gay v. State*, 7 K. 394;) and will be held binding if signed by sureties while accused is at liberty, the accused having been released at request of one of sureties. (*State v. Terrell*, 29 K. 563.) An instrument in writing, purporting upon its face to be a criminal recognizance, and executed as such, is not void as to those executing it, although it may be in form a penal bond, be signed and executed by sureties only, and not by the principal, and contains the initials only of the Christian name of the principal. (*Ingram v. State*, 10 K. 630.) A recognizance need only contain the penalty, and the condition. (*McLaughlin v. State*, 10 K. 581.) Where the examination and commitment by the police judge of a city of the second class are wholly illegal and unauthorized, and the party committed thereunder executes a recognizance to appear before the district court, in order to be released from illegal custody, such recognizance is without any validity. (*State v. Davis*, 26 K. 205.) Code has swept away prior decisions. (*Jennings v. State*, 13 K. 80.)

157. A petition by the surety on a recognizance, to vacate the judgment against him, because principal was dead at the

time, states no cause of action; (*McLaughlin v. State*, 17 K. 283;) and it is not necessary, in an action on a forfeited recognizance, to copy order of forfeiture or allege it was duly made. (*Rheinhardt v. State*, 14 K. 318.) It is not necessary, in a suit upon a forfeited recognizance, that it should be shown that the default or forfeiture was ever in fact entered of record. (*Ingram v. State*, 10 K. 630.) The material question in such a case is whether a default was actually made or not; and therefore, an answer that merely alleges that there is *no record* of such default or forfeiture, states no defense. (*Barkley v. State*, 15 K. 99.) Interest runs on a recognizance from the time of forfeiture; (*Swerdseger v. State*, 21 K. 475;) and where bail money is forfeited, it is only necessary to enter fact of deposit and failure to appear of record, and then to direct the clerk to turn money over to county treasurer; (*Morrow v. State*, 6 K. 222;) but the order turning over bail money to county treasurer is reviewable. (*Morrow v. State*, 6 K. 222.)

158. When bail money is deposited, no recognizance is required. (*Morrow v. State*, 6 K. 222.) A person charged with murder in the first degree is entitled to be let to bail where the proof is not evident, nor the presumption great; (*In re Malison*, 36 K. 725;) and where the court has failed to fix the amount of bail of a defendant arrested upon a warrant issued upon an information, and there is no district judge in the county, the clerk of the district court may fix the bail of the defendant. (*State v. Schweiter*, 27 K. 499.) The original complaint and warrant of arrest may charge one offense, and the defendant may be bound over for another if it shall appear on the examination that he is guilty of a public offense other than that charged in the warrant. In such a case, in justice to the defendant, a new complaint ought to be filed, but the statute does not in terms require it. (*Redmond v. State*, 12 K. 172.) Ambiguity of person in recognizance may be explained by evidence. (*Gay v. State*, 7 K. 394.) Where a party is delivered to sheriff by his sureties on recognizance, without any copy thereof, he may escape, and any one may assist him. (*State v.*

Beebe, 13 K. 589.) An action on a forfeited recognizance may be maintained against a person who executed the same to procure his own personal liberty, although such person may have been a minor at the time he executed the same, having a guardian for his property, and although he may have executed the same without the consent of his guardian. (*Weatherwax v. State*, 17 K. 427.)

159. On the continuance of a criminal case in the district court, the witnesses may be required to give personal recognizance for their appearance at the next term, but cannot be compelled to give recognizances with sureties. Even though such a recognizance be signed by sureties, it imposes no liabilities on them. (*State v. Lane*, 11 K. 458.) A state witness moving out of the state, but under recognizance, may receive mileage from state line. (*Commissioners of Lyon Co. v. Chase*, 24 K. 774.) A county treasurer receiving anything but money on a forfeited recognizance is immediately liable. (*Blake v. Commissioners of Johnson Co.*, 18 K. 266.) Persons on bail are not entitled to *habeas corpus*. (*Territory v. Cutler*, McC. 153.) Where the clerk, through a clerical mistake is entitling the order changing the venue, writes the word "manslaughter" where the words "murder in the second degree" should have been written, the mistake will not invalidate the order. (*State v. Potter*, 16 K. 80.)

RECORD.

160. The supreme court cannot assume the existence of a portion of the record not before it, nor render a judgment which, upon the face of its own record, would appear to be without jurisdiction, although the appellee may appear and argue the merits; (*Carr v. State*, 1 K. 331;) and a question not raised by the record will not be reviewed. (*State v. Boyle*, 10 K. 113.) It appeared from the journal that the defendant was tried by a jury of nine persons only. The case was appealed

to this court by defendant. Pending this appeal, the journal was duly corrected by the order of that court, so as to speak the truth. Thereafter, upon suggestion in this court of a diminution of the record, it was held competent to permit the transcript to be amended to correspond with the record as corrected. (*State v. McAnulty*, 26 K. 533.) Pleadings, orders and judgments should not be entered in a bill of exceptions. (*State v. Nickerson*, 30 K. 547.) Instructions not filed in the papers of case for fifteen days, not material error. (*State v. Buffington*, 20 K. 599.) A certified copy of original bill of exceptions is not a transcript of proceedings in criminal case; (*State v. Lund*, 28 K. 280;) and a bill of exceptions must be regularly settled; agreed statements of counsel and mere certificate of clerk will be disregarded. (*State v. Bohan*, 19 K. 28.)

161. Where the bill of exceptions states part of the instructions were given orally, held error; (*State v. Potter*, 15 K. 302;) and waiver by counsel will not make valid an invalid bill of exceptions; (*State v. Bohan*, 19 K. 28;) and an order to have a bill of exceptions allowed as of previous term is a nullity. (*State v. Bohan*, 19 K. 28.) A recognizance not recorded will not defeat a recovery. (*Jennings v. State*, 13 K. 80.) Where the record fails to show that one of the petit jurors was selected from the bystanders, it will not vitiate the verdict, the defendant not being prejudiced. (*Montgomery v. State*, 3 K. 263.) When a change of venue is granted, where the record does not show that he was absent, the supreme court will presume that the defendant was personally present. (*State v. Potter*, 16 K. 80.)

TERM.

162. The district court can adjourn the term in one county to a day subsequent to that fixed by law for the commencement of the regular term in another county of the same district; (*State v. Montgomery*, 8 K. 351;) but a trial by *pro tem.* judge, while regular judge is holding term in adjoining county, is void.

(*In re Millington*, 24 K. 214; *Cox v. State*, 30 K. 202.) Where the district court was continued to the 24th of May next thereafter, and the court did not convene on the said 24th pursuant to adjournment, the court is legally open until it adjourns *sine die*, or expires by law. (*State v. Bohan*, 19 K. 28.)

TRIAL.

163. In the absence of the regular judge of the district court, or if he makes no order to the contrary, a *pro tem.* judge may adjourn the court from day to day until the case of which he has charge has been finally disposed of; he may adjourn the court to some other day for the trial or hearing of other cases set for trial or hearing during that term, and which have not yet been disposed of. (*State v. Palmer*, 40 K. 474.) Where a person under indictment or information for crime, and committed to prison, is not brought to trial before the end of the second term of the court having jurisdiction of the offense which is held after such indictment or information is filed, he is entitled to be discharged, so far as relates to the offense for which he is committed, if the delay does not happen upon his application, and is not occasioned by the want of time to try the case at such second term; provided it further appears that the delay is not caused to enable the state to procure material evidence for a trial at the succeeding term. (Crim. Code, §§ 220, 222.) (*In re McMicken*, 39 K. 406.) A person who is imprisoned on an indictment or information may be discharged from imprisonment, under *habeas corpus*, if he has applied to the district court for his discharge because he has not been tried in accordance with § 220 of the criminal code, and it clearly appears by the record that the court erroneously denied his application, and refused his discharge. *In the matter of the petition of William T. Edwards*, 35 K. 99, modified and corrected. (*In re McMicken*, 39 K. 406.) The court being satisfied that the jury could not agree, discharged them in the absence of the prisoner and his

counsel, after they had been together for deliberation from four o'clock P. M. to six o'clock A. M. This did not entitle the defendant to a discharge and release. (*State v. White*, 19 K. 445.) It is within the discretion of the court, whether it will delay the proceedings for the purpose of enabling the defendant to bring in additional testimony. (*State v. Furbeck*, 29 K. 532.) A criminal trial once commenced must be carried through to its close, and a failure to finish it is equivalent to an acquittal of the defendant. Jurors were and are summoned only for the term. Process for witnesses loses its force at the end of the term. (*Butler v. McMillen*, 13 K. 391.)

VARIANCE.

164. The name "Mollie Brown" will be held to be the same as "Mary Brown." (*State v. Watson*, 30 K. 281.) Where the information is verified by the oath of a private person, and not by the county attorney, the defendant should not be found guilty of any offense, except some offense of which the complaining witness had notice or knowledge at the time of verifying the information. (*State v. Brooks*, 33 K. 708.) Under charge of giving drugs to destroy child unborn, the defendant may be convicted of intending to procure miscarriage. (*State v. Watson*, 30 K. 281.) In a suit against G. W. Barkley, evidence that the defendant on recognizance bond appeared as G. W. Barkley and George W. Barkley, and forfeiture by George Barkley, not material. (*Barkley v. State*, 15 K. 99.) Under the circumstances, as all the parties and the jury understood that William Porter was the W. R. Porter who had testified, therefore, their verdict to the effect that the defendant was guilty of making sales to William Porter will not be set aside upon the ground that there was no evidence showing such sales. (*State v. Drake*, 33 K. 151.) Evidence showing the larceny of a gelding will not sustain a charge for stealing a horse. (*State v. Buckles*, 26 K. 237.) Where an information charges the lar-

ceny of the property of Michael W., evidence that the property belonged to J. M. W. will not sustain a verdict, although M. W. testified that his name was J. M. W., and that he owned the property. (*State v. Taylor*, 15 K. 420.)

VENUE.

165. An information for murder was held good although it omitted place of death; (*State v. Bowen*, 16 K. 475;) and an indictment charging "at Ogden, in the county of Riley aforesaid," caption and body giving the state, sufficient. (*State v. Muntz*, 3 K. 383.) An indictment failing to locate county is defective; (*Territory v. Freeman*, McC. 56;) and where the venue is not alleged, a conviction is improper. (*State v. Hinkle*, 27 K. 308.) Where the court orders the venue of an indictment or information to be corrected, under the provisions of § 231 of the criminal code, the clerk of the district court in which the case is pending should make out a full transcript of the record and proceedings in the cause, including the order of removal, and transmit the same, duly certified under the seal of his court, to the clerk of the court to which the removal is ordered. (*State v. Goodwin*, 33 K. 538.) It is not error, where the court exercises a sound judicial discretion, to permit a criminal case to be opened during the closing argument of the counsel for the defense, and to permit the state to prove in what county and state the alleged offense was committed. (*State v. Teissedre*, 30 K. 476.)

166. Complaint under city ordinance, giving venue in caption, and the name of city in body, will be sufficient. (*Smith v. City of Emporia*, 27 K. 528.) Evidence showing that the witness resided in Phillips county, Kansas, and that the offense was committed on his premises, and near his residence, is sufficient evidence to show that the offense was committed in Phillips county, Kansas. (*State v. Benson*, 22 K. 471.) In a liquor case, a description selling liquor in a one-story frame building

within city, known as West's drug store, is sufficient description of place. (*West v. City of Columbus*, 20 K. 633.) Burglary may be committed in a saloon building. (*State v. Comstock*, 20 K. 650.) The guaranty of a trial by a jury of the county in which the offense is charged to have been committed, must be construed as qualified by the power of attaching counties or undivided territory to a judicial district. (*In re Holcomb*, 21 K. 628.) When the description of the offense located house, lot, block, city of Ottawa and county of Franklin, against the peace, etc., of the state of Kansas, venue was sufficient. (*State v. Walter*, 14 K. 375.)

167. The place where offense is charged must be proved; (*Hagan v. State*, 4 K. 90;) but larceny may be charged to have been committed, and may be indicted and punished, in any county into or through which such property shall have been brought. (*McFarland v. State*, 4 K. 68.) One requisite of an indictment is, that it be found by the grand jury of the county where the court is held. (*Jackson v. State*, 4 K. 150.) An objection that the county attached for judicial purposes should try the case was properly overruled, there being no evidence of the organization of that county. (*State v. Ruth*, 21 K. 583.) Where an accused had a gelding delivered to him as bailee, in Sedgwick county, and thereafter fraudulently removed the animal, for the purpose of applying it to his own use, from Sedgwick to Sumner county, and traded off the same in that county, and then, upon demand in Sedgwick county, refused to return the animal to the person entitled thereto, in accordance with the terms of the bailment, and falsely stated that the animal had strayed away from him, the offense of embezzlement was complete in Sedgwick county. (*State v. Small*, 26 K. 209.) Where a forged time check was uttered in Missouri, but was paid to innocent holder by railroad in this state, the crime is committed in Missouri. (*In re Carr*, 28 K. 1.) A prosecution under the act providing for the maintenance and support of illegitimate children is not local, but may be brought in any county or before any justice of the peace of the state; and the warrant may

be served in any part of the state where the defendant may be found. (*In re Lee*, 41 K. 318.)

168. A prosecution in wrong county, case should be sent to proper county, before verdict or judgment. (Crim. Code, § 231.) (*State v. Goodwin*, 33 K. 538.) On a motion for a change of venue the appellant read a number of affidavits tending to show, by general averments, and not by specific statements of facts, that such prejudice existed against him in the county that he could not have a fair trial. For the state a number of affidavits were read, tending to show that a fair trial could be had, and that in the different portions of the county where the affiants resided no prejudice against the appellant existed. The court refused to grant the change of venue. *Held*, No error. (*State v. Horne*, 9 K. 119.) On application for change of venue, prejudice of judge must be shown by affidavits. (*City of Emporia v. Volmer*, 12 K. 622.) Neither unfavorable comments as to the innocence of a defendant in a criminal case, after a verdict of guilty by a jury, made by a trial judge upon the evidence introduced in the case, when passing sentence upon such defendant, nor adverse rulings, nor errors of judgment, of themselves amount to prejudice on the part of a judge so as to compel a removal of the case (upon a new trial granted by the supreme court) to the district court of some county in a different judicial district. (*State v. Bohan*, 19 K. 28.) A change of venue in a criminal case, on account of the bias or prejudice of the inhabitants of the county against the defendant, can only be had when the existence of such bias or prejudice is shown to the satisfaction of the court. (*State v. Adams*, 20 K. 311.)

169. On an application for a change of venue, some six or seven newspaper articles were offered, containing statements of facts similar to those disclosed by the state on the trial, and denouncing in strong and severe language the defendant; also the affidavit of a single witness that he was one of the party engaged in the search for defendant immediately after the shooting, and that he heard bitter and threatening language in every direction against him. Opposed, were the affidavits of twenty-

one citizens from different parts of the county, denying any general prejudice, or any feeling which would prevent a fair trial. It was not shown that there was any difficulty in obtaining a jury, or any reason to suspect the candor and fairness of the jurors impaneled. The judgment ought not to be set aside because of the refusal to grant a change of venue. (*State v. Rhea*, 25 K. 576.) Before a court is justified in sustaining an application for a change of venue on account of the prejudice of the inhabitants of the county, it must affirmatively appear from the showing that there is such a feeling and prejudice pervading the community as will be reasonably certain to prevent a fair and impartial trial. (*State v. Furbeck*, 29 K. 532.) Where a petition is presented for a change of venue upon the ground that the minds of the inhabitants of the county in which the cause is pending are prejudiced, the specific facts and circumstances showing such prejudice must be established by affidavits or other evidence. (*State v. Knadler*, 40 K. 359.) Where a defendant in a criminal cause applies for a change of venue from the county where the offense is alleged to have been committed, to some other county in the same judicial district, upon the ground that he cannot obtain a fair trial where the prosecution is pending, and against his objection and without his consent the district court changes the place of trial to a county embraced in another judicial district, the defendant does not thereby waive his constitutional right to object to being tried in the judicial district to which the cause is removed. (*State v. Knapp*, 40 K. 148.) A motion for a change of venue was supported by the affidavits of the accused and two others, but the state filed over ninety affidavits controverting them. The court did not err in refusing a change of venue. (*State v. Bohan*, 15 K. 407.) Where a motion to change the venue is made without serving notice on the district attorney, but where he argued the motion on the merits, not objecting to the want of notice, the effect of the motion cannot be avoided by afterwards showing such want of notice. (*Smith v. State*, 1 K. 365.)

170. Where a statutory act is to be done by a public officer,

affecting the public, or rights of third persons, it is the duty of the officer to do it. (*Smith v. State*, 1 K. 365.) A change of venue was held to be mandatory, and should be granted on proper application. (*Smith v. State*, 1 K. 365.) The defendant sustained his application for a change of venue by his affidavit, and he conformed to the requirements of § 159 by swearing that the grounds of his motion had come to his knowledge since the last continuance. Upon such a showing it is not discretionary with the court to refuse the change. (*Smith v. State*, 1 K. 365.) In a proceeding for disbarring an attorney at law, the defendant is entitled either to a change of venue or to a trial before a judge *pro tem.*, on making the proper application and showing. (*Peyton's Appeal*, 12 K. 398.) The right to be tried "by an impartial jury of the county" is a mere personal privilege which the defendant may waive by change of venue or insist upon at his option; (*State v. Potter*, 16 K. 80;) and the trial of a defendant charged with a criminal offense cannot, upon the motion of the prosecutor or state, and against the objection and without the consent of the defendant, be removed out of the county and district where the offense is alleged to have been committed. (*State v. Knapp*, 40 K. 148.)

171. A change of venue in a criminal action from one judicial district to another, granted on the application of the defendant, is not void, although the application may not be in writing, and although sufficient facts therefor are not shown and do not exist. (*State v. Potter*, 16 K. 80.) Where the clerk, in entitling order changing the venue, writes "manslaughter" for "murder in the second degree," it will not invalidate the order; (*State v. Potter*, 16 K. 80;) and where a court granting a change of venue in a criminal case fails to make any order for the removal of the defendant to the jail of the county to which the case is removed, and the defendant is personally present at the trial of the case, the judgment of the district court will not be reversed merely because of such failure to make such order. (*State v. Potter*, 16 K. 80.) Where a criminal case is taken on a change of venue from one county to

another, it is not necessary that the original information, or any other original paper, should be transferred to such other county. (*State v. Riddle*, 20 K. 711.)

VERDICT.

172. The jury returned their verdict of guilty into court while the clerk and his deputy were absent. There were present at the time in the court, the presiding judge, the county attorney and the sheriff. Objection was made by the defendant to the reception of the verdict in the absence of the clerk. The court overruled the objection, received the verdict, and discharged the jury. There was no request by defendant to poll the jury, and the verdict was afterward properly filed and recorded by the clerk. *Held*, That the reception of the verdict under these circumstances did not involve any material error. (*State v. McAnulty*, 26 K. 533.) Neither the defendant nor his counsel, in the absence of notice, were bound to be in attendance upon the court on Sunday on the coming in of the jury. On account of the action of the court in discharging the jury, and refusing to poll the jury in the presence of the defendant, the judgment must be reversed. (*State v. Muir*, 32 K. 481.) After the jury had retired for deliberation the court adjourned to the next morning. During such adjournment, without objection the verdict was received, opened, and read; and then, at the instance of defendant, the jury was polled. Although the verdict was not, as the statute provides, "rendered in open court," yet the error must be disregarded on appeal. (*State v. McKinney*, 31 K. 570.) A verdict of guilty on one count in a criminal complaint, saying nothing as to other counts, is equivalent to a verdict of not guilty as to such other counts; and where the defendant procures a new trial, he can be tried at the new trial only for the offense charged in the count upon which he was found guilty at the former trial. (*State v. McNaught*, 36 K. 624.) Where a criminal prosecution for murder in the

first degree has been tried by a jury, and the jury has found the defendant guilty of murder in the first degree, and the court trying the cause has sustained the verdict, and where the evidence is conflicting and contradictory, but where the evidence tending to show the defendant's guilt is sufficient if it were not contradicted by other evidence, the verdict will not be disturbed by the supreme court merely upon the ground that it is not sustained by sufficient evidence. (*State v. Morrow*, 13 K. 119.) Where the jury agreed that each juror should name the amount for which he was willing to give a verdict, and that the sum of these amounts should be divided by twelve, and that the quotient should be the verdict, a verdict so made up must be set aside. (*Johnson v. Husband*, 22 K. 277; *Werner v. Edmiston*, 24 K. 147.)

173. On a motion for a new trial, defendant offered the affidavits of two of the jurors, showing that, upon consultation in the jury room, it appeared that a majority were in favor of returning the verdict finally returned, and a minority opposed thereto; that a compromise was agreed upon, whereby the verdict was agreed to by all. There was no error in overruling the motion for a new trial. (*State v. Rhea*, 25 K. 576.) Affidavits of jurors will not be read to impeach their verdict on any ground essentially necessary to consider in making up the verdict. (*State v. Horne*, 9 K. 119.) Where the jury returned a verdict of guilty, and adding a recommendation that defendant receive the lowest punishment allowed by law, and the court declined to receive it, and handed them a form the same as the prior verdict, but without the recommendation, which was duly signed and returned, no error has been committed. (*State v. Potter*, 15 K. 302.) Where a defendant is charged with committing murder in the first degree, and "the jury find the defendant guilty in manner and form as charged in the information," without otherwise stating the degree of the offense of which they find the defendant guilty, and no motion for a new trial is made, and the court sentences the defendant as for murder in the first degree, and the record of the case does not show that the defendant

was informed by the court of the verdict of the jury, and asked whether he had any legal cause to show why judgment should not be pronounced against him, the judgment of the court below must be set aside. (*State v. Jennings*, 24 K. 642.) In a prosecution for burglary, and the verdict is "guilty as charged," sufficient, where the information locates the degree. (*State v. Adams*, 20 K. 311.) Where, in a case of murder in the second degree, a verdict is as follows: "We, the jury, find the defendant guilty as charged," it is not error for the court, after being informed by the jury that they intended to find the defendant guilty of murder in the second degree, to allow the verdict to be amended as follows: "We, the jury, find the defendant guilty of murder in the second degree, as charged in the information." (*State v. Potter*, 16 K. 80.)

174. A verdict was: "We, the jury, find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree." It was evident that the jury only intended to acquit of the major crime in terms charged, to wit, that of murder in the second degree, and did not intend to acquit of the different degrees of manslaughter included therein. (*State v. Bowen*, 16 K. 475.) Upon an information charging murder in the first degree, if the jury do not specify in their verdict the degree of offense of which they find the defendant guilty, their verdict is defective; and although the defendant may not except to the ruling of the court overruling his motion for a new trial, nor object to the sufficiency of the verdict in any other manner except by moving for a new trial, still he is not deprived of his right to appeal to the supreme court, and then raise the question of the sufficiency of the verdict. (*State v. Huber*, 8 K. 447.) Where the information charges a crime under two sections, a verdict stating facts under one, and judgment accordingly, is not error. (*State v. Fisher*, 8 K. 208.) An information which in one count charges murder in the first degree, charges all the different degrees of felonious homicide, including murder in the first and second degrees, and manslaughter in its four different de-

grees. A verdict that finds the prisoner guilty as charged, without specifying of what degree of the offense he is found guilty, is not such a verdict as will authorize a judgment for murder in the first degree. (*State v. Reddick*, 7 K. 143.) Homicide by personal acquaintance, on accidental meeting, without previous grudge, does not justify finding of premeditation and deliberation. (*Craft v. State*, 3 K. 450.) A verdict finding guilty of an attempt to commit a rape need not state that the defendant did some act towards the commission. (*State v. Otey*, 7 K. 69.)

WAIVER.

175. When a defendant appeals to the district court and submits to trial without objection, upon a complaint which was not certified to by the justice of the peace, he will be held to have waived the want of certification; (*State v. English*, 34 K. 629;) and where a defendant obtains a new trial by reason of defect in information, he waives right to plead former jeopardy. (*State v. Hart*, 33 K. 218.)

WARRANT.

176. Where the information is not in the record, it will be presumed to be complete, and a warrant thereon, stating generally the crime, and omitting county, held sufficient. (*Jennings v. State*, 13 K. 80.) A warrant omitting Christian name does not protect for false imprisonment. (*Prell v. McDonald*, 7 K. 426.) A warrant should be signed by the clerk, with seal of court attached; (*Jennings v. State*, 13 K. 80;) and where an information is filed within twenty days preceding a term of court, the clerk may issue a warrant thereon as soon as practicable after the filing of the information. (*State v. Schweiter*, 27 K. 499.)

WITNESS.

177. On a continuance, the witnesses may be required to give personal recognizances, but not to give sureties. (*State v. Lane*, 11 K. 458.) The fees are properly taxed against the defendants, though some plead guilty; (*State v. Granville*, 26 K. 158;) but a prosecuting witness in an action to prevent an offense is never liable for costs. (*State v. Menhart*, 9 K. 98.) Under the statute of 1871, the wife of the accused is a competent witness for the state in the trial of her husband for a criminal offense. The court cannot require her to testify, but may permit her to do so voluntarily. (*State v. McCord*, 8 K. 232.) An accomplice used by the state, as witness, is not entitled to his discharge as a matter of right; he must abide by the discretion of the court and prosecuting attorney. (*Cummings v. State*, 4 K. 225.) When the name is indorsed by mistake J. W. Stillwell instead of J. M. Stillwell, it is not error to allow him to testify. (*State v. Blackman*, 32 K. 615.)

178. Where it is claimed that the trial court erred in permitting a witness to testify whose name was not indorsed on the indictment, but it is not shown what the witness's testimony was, or that any objection was made to his testimony, or for whom he testified, if he did testify, no error is shown. (*State v. Shenkle*, 36 K. 43.) Where, during the trial, the court permitted the names of seventeen additional witnesses to be indorsed upon the information, and permitted such witnesses to testify, but there is no showing as to what their testimony was, the supreme court cannot say that the trial court abused its discretion. (*State v. Taylor*, 36 K. 329.) It is within the discretion of the court to permit the name of a witness known to the prosecuting attorney at the time of the filing of the information, to be indorsed thereon after the commencement of the trial. (*State v. Cook*, 30 K. 82.) The court may in its discretion permit the county attorney to indorse the names of the witnesses on the information, even if the trial has commenced; (*State v.*

McKinney, 31 K. 570;) and it is not error for the district court to permit the county attorney to indorse the names of additional witnesses upon the information, and then to allow such witnesses to testify in the case, the court exercising a sound judicial discretion in permitting the same to be done. (*State v. Teissedre*, 30 K. 476.)

179. It is not error to permit a witness on the part of the state in a criminal prosecution, whose name has become known to the prosecutor after the commencement of the trial, to testify, even though the name of such witness has not been indorsed upon the information; (*State v. Dickson*, 6 K. 209; *State v. Medlicott*, 9 K. 257;) and where a witness in a criminal prosecution testifies without his name having first been indorsed upon the indictment, without objection, it is too late to make the objection for the first time in the supreme court. (*State v. Schmidt*, 34 K. 399.) Where the complaint does not allege the kind of liquor sold, or to whom sold, but the prosecuting witness intended to charge a sale to one F., and upon such charge defendant is convicted before a justice of the peace, and from such conviction appeals to the district court, and upon trial in the district court is convicted upon such charge, but upon an alleged sale to one J., and where it is shown that at the time of making the complaint the prosecuting witness had knowledge of the sale to J., and gave his name as a witness, with the names of other witnesses, to the county attorney to sustain said charge, the evidence is sufficient to warrant a conviction. (*State v. Coulter*, 40 K. 87.) Where a defendant assumes the character of a witness, he is subject to the same tests, and to be contradicted, discredited or impeached, the same as any other witness. (*State v. Pfefferle*, 36 K. 90.) A witness may be impeached by proving contradictory statements; to confirm the witness, statements made antecedently to contradictory statements may sometimes be shown. (*State v. Petty*, 21 K. 54.)

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